UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CP ANCHORAGE HOTEL 2, LLC,
D/B/A HILTON ANCHORAGE

and

UNITE HERE! LOCAL 878, AFL-CIO

Cases 19-CA-193656
19-CA-193659
19-CA-203675
19-CA-212923
19-CA-212950
19-CA-218647
19-CA-228578

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This consolidated matter[1] was heard by Administrative Law Judge Andrew S. Gollin from October 28 through 30, 2019, in Anchorage, Alaska, and on November 12, 2019, in Seattle, Washington, pursuant to a Further Amended Consolidated Complaint alleging that CP Anchorage 2, LLC, d/b/a Hilton Anchorage ("Respondent"), engaged in several unfair labor practices within the meaning of §§ 8(a)(1), (4),[2] and (5) of the Act.

I. INTRODUCTION

This case involves Respondent's anti-union animus and its multi-year dispute with UNITE HERE! Local 878, AFL-CIO (the "Union"). In 2005, when Respondent took over the operation of the hotel, it adopted its predecessor's collective bargaining agreement with the Union and recognized the Union as the collective-bargaining representative of most of Respondent's employees (the "Unit employees"). Despite the parties bargaining for a new agreement in 2008 and early 2009, Respondent declared impasse and implemented parts of its contract proposal in March of 2009. In recent years, the parties have had a strained relationship stemming, primarily, from the absence of a collective bargaining agreement, Respondent's many alleged unfair labor practices, and the Union's boycott efforts.

In April 2014, after additional negotiations between Respondent and the Union failed, Respondent discontinued its participation in the Union's heath care trust, and implemented its health insurance proposal. Thereafter in early 2017, Respondent ratcheted up tensions by infringing upon the Union's limited access to its members due to surveillance when they did get in to meet with the employees. Specifically, Respondent increased the presence of its managers in the employee cafeteria, the one room where the Union's representatives were contractually permitted to visit with employees, from only 1 or 2 to as many as 10.

[1] On November 27, 2019, the parties jointly moved the Administrative Law Judge to sever Case 19-RD-223516 from the above-captioned matter and remand it to the Regional Director of Region 19. On November 29, 2019, the Administrative Law Judge granted the motion.

[2] The General Counsel amended the Complaint on the record to add a violation of § 8(a)(4). (GCX 11).

Noticing the effect of this surveillance on its interactions with Respondent's represented employees, the Union filed an unfair labor practice charge. In response, Respondent proposed making changes to the terms of the implemented contract proposal to restrict the Union's access rights, and threatened that those changes would be implemented unless the Union met to bargain. Seeking to avoid having Respondent further interfere with its access to the represented employees, the Union agreed to bargain, but explained it wanted to bargain for a successor agreement, not just Union access. The parties began bargaining in April, 2017.

While the negotiations were taking place, Respondent revealed a number of unilateral changes it had implemented to Unit employees' terms and conditions of employment, unilaterally announced to the Union that the Union's summer interns were no longer permitted on the premises of the hotel, and then refused to provide the Union with the names of employees whose alleged complaints about the Union were cited as one of the reasons underpinning Respondent's announcement. Even without this information, the Union made counter-proposals to Respondent's proposed changes in an attempt to address Respondent's alleged concerns. However, Respondent dismissed those attempts outright, insisting that the Union must agree to not be in the cafeteria, and then refused to make proposals on any topic other than Union access. Ultimately, despite no longer being at impasse, Respondent refused to continue bargaining with the Union and implemented its further restrictions on Union access.

Then, just days after implementing these restrictions without having reached impasse, Respondent called the Anchorage Police Department to report that Union representatives were trespassing when they were simply checking in with their members at the hotel as permitted under the implemented contract proposal. Respondent then doubled-down on this, posting a notice by the time clock informing employees that they didn't need the Union, and stating that Respondent's managers welcomed employees to come to them with concerns they had for solutions that were satisfactory to the employees.

The record evidence presented at hearing and an analysis of the operative legal principles is set forth below. Application of the legal principles to the evidence establishes that Respondent violated §§ 8(a)(1), (4), and (5) as alleged. The brief concludes with a request that Respondent be ordered to remedy its unfair labor practices as set forth in the attached recommended Order and Notice.

II. FACTS

A. The Parties and Their Collective Bargaining Relationship

Respondent is engaged in the business of operating a 606 room Hilton Hotel in in Anchorage, Alaska (the "facility" or "hotel"), where it provides food and lodging to the public. (669:16-20; JTX 1).[3] The Union has represented a wall-to-wall unit encompassing most of the employees at the facility (the "Unit employees") for over 30 years. (67:23-68:1); JTX 2, p.1). Depending on the time of year, the Union represents between 130 to nearly 200 employees at the facility. (67:6-22; 581:5-8).

In 2015, the General Manager of the hotel was Bill Tokman. (57:19-20, 515:8-11, RX 12, RX 16). He was succeeded by Soham Bhattacharyya ("Bhattacharyya"), who became the interim General Manager of the hotel as of September 2016, and then General Manager as of January 2017. (666:1-17, 724:15-21). He remained in that position until October 10, 2017, when he transferred to the Hyatt Regency in Denver, Colorado. (666:1-17, 724:15-21; JTX 1 ¶ 30). Bhattacharyya was succeeded by Stephen Rader ("Rader"), who had been the Assistant Manager at the facility under Bhattacharyya. (JTX 1 ¶ 30). At the time of the hearing, Rader was employed by Respondent as a consultant who was flown to Seattle from Hawaii to testify, and who was being paid by Respondent for the time he spent testifying. (799:16-800:5).

With respect to the Union, Marvin Jones ("Jones") is the Union's President. (66:24-67:2). Danny Esparza, who has been working with the Unit employees at the facility since about 2010 and reports to Jones,

[3] References to the transcript appear as (__:__). The first number refers to the pages; the second to the lines. References to General Counsel Exhibits appear as (GCX __); references to Joint Exhibits appear as (JTX_); and references to Respondent Exhibits appear as (RX __).

is the Vice President. (66:1-9, 68:5-11). In June 2016, Dayra Valades began working for the Union as an Organizer and then with the Unit employees shortly thereafter. (381:17-382:2).

Respondent has recognized the Union as the exclusive collective-bargaining representative of the Unit employees since about December 28, 2005, when it adopted the collective-bargaining agreement in effect until August 31, 2008. (GCX 1(kk) ¶5, GCX 1(mm) ¶5; JTX 1 ¶ 7, JTX 2). In 2008 and early 2009, the parties met to bargain a successor collective bargaining agreement. However, on March 30, 2009, Respondent declared impasse and then, on April 13, 2009, implemented parts of its March 11, 2009, contract proposal (the "Implemented Agreement").[4] (JTX 1, ¶¶8-10, JTX 3, JTX 4). In 2013, Respondent proposed to discontinue its participation in the Union's health care Trust and proposed to have the Unit employees participate in Respondent's health plan. (JTX 5). This was followed by a round of negotiations between the parties for a collective bargaining agreement which ended in February 2014, following Respondent's declaration of impasse, and announcement that it would be implementing its health insurance proposal on April 1, 2014. (JTX 5).

B. 2015 Negotiations

On July 2, 2015, then-General Manager Tokman sent a letter to the Union, voicing his concern about a survey concerning mold problems that volunteers with the Union's International had placed under the guests' doors at the facility. (RX 12). In the letter, Tokman stated that the Union's actions exceeded what was permitted by the Article IV in the Implemented Agreement (*i.e.*, Union access rights), and threatened legal action if representatives of the Union trespassed again. (JTX 4; RX 12).

Thereafter, by letter dated July 10, 2015, Respondent informed the Union that it wished to change Article IV as follows:

> Business representatives or other authorized representatives of the Union shall be permitted to visit the premises of the Employer at reasonable times during working hours, provided such representatives first make advance arrangements with the General Manager or his designee. When visiting

[4] There is also a contract document that Respondent has worked off of with the date "3-11-16" printed on it that is discussed *infra*.

> the Hotel, the Union representative shall sign in and out on a log maintained by the Employer at the front desk. The Union representative shall print and sign his name and record the time he entered and left the Hotel. When the Union representative notifies the General Manager in advance of his desire to visit the Hotel, the General Manager will make a room available for the Union representative to use. Meetings by the Union representative with Hotel employees shall be limited to the room made available to Union by the General Manager unless other arrangements are made with the General Manager. If the Union wishes to meet with employees in a particular location, an advance written request shall be sent by the Union to the General Manager. No meetings shall be held with employees during rush hours.

The letter ended by stating that Respondent proposed to implement the changes to Article IV effective August 1, 2015, absent a request from the Union to bargain by July 20, 2015. (RX 13).

At the time this letter was sent, the language in Article IV contained a requirement that the Union's representatives make their presence known to Respondent, but there was no requirement to sign in or out. (JTX 4). Further, instead of having to request that the General Manager set aside a room for the Union's representatives to meet with employees, the language provided that Union representatives would conduct interviews with employees in the employee cafeteria. (JTX 4).

The Union requested bargaining and, beginning in late summer of 2015, the parties met to bargain over Respondent's proposal to change Article IV, as well as proposals made by Respondent relating to scheduling employees and the ability of Respondent to inspect the personal property of Unit employees. (249:15-23, 519:4-14; RX 14, RX 15). The parties met for approximately two bargaining sessions. (341:18-22). Over the course of these negotiations, Respondent provided the Union with several reasons it was proposing to alter the language of Article IV, including concerns about non-Unit employees being able to enjoy their time in the cafeteria without having to hear announcements made by the Union's representatives. (RX 15). The parties did not reach agreement on the issues negotiated in 2015. (250:4-6, 341:18-25).

In a separate discussion away from the table between Jones and Tokman in November 2015 regarding these issues, Jones asserted that Respondent's proposal to alter the language of Article IV was unfair and assured Respondent that the Union, under Jones' leadership, would not be delivering flyers to

customers' rooms in the future. (519:19-521:19, 523:1-17; RX 13, RX 19). Based on that assurance, Respondent ceased pursuing its proposal to alter the language of Article IV. (523:12-20; RX 20). There was no evidence that the Union distributed flyers to hotel guests at the facility after that time.

However, there was an incident involving Union flyers being placed under guestroom doors at Respondent's Anchorage Marriott hotel brought to Jones' attention by Respondent the following year. (348:6-8; RX 16, RX 17). Jones explained that he did not authorize the conduct at the Marriott hotel, and that the conduct was part of a national campaign. (526:6-23; RX 16).

C. The Union Requests Information from Respondent

In the absence of a bargained-for agreement, the Union sought to ensure that the terms of the Implemented Agreement were being followed. By letter dated January 3, 2017,[5] Jones explained to Bhattacharyya that it was brought to his attention that the schedules of bussers at Respondent's Berry Patch restaurant had been reduced and, as a result, wait staff had assumed the duties of the bussers. (JTX 7; RX 36A, p.1). The letter requested that this practice cease, that bussers be compensated for their lost wages and benefits, and that Respondent provide the Union with relevant schedules, time cards and payroll records. (JTX 7; RX 36A, p.1). Bhattacharyya was on an eight to ten day vacation at the time Jones submitted this letter and information request, along with three other letters concerning the terms and conditions of Unit employees. (701:1-14; RX 36A, pp.2-4, RX 37).

Bhattarcharyya responded to Jones' four letters on January 20. (RX 38). With respect to Jones' concerns involving restaurant servers, Bhattacharyya denied there was a practice of having restaurant servers bus their own tables, but noted that there had been occasions when finding replacements for bussers who had called in on short notice had been difficult. (JTX 8; RX 38, p.4). Bhattacharyya did not address Jones' request for information, but did go out of his way to point out that the name of the restaurant had been changed 11 years earlier from Berry Patch to Hooper Bay. (JTX 8; RX 38, p.4).

[5] Hereafter, all dates are 2017 unless otherwise indicated.

With respect to the information requested by Jones, Bhattacharyya testified that he had intended to provide the information, but simply forgot to attach it to the letter, claiming there were many requests he had to respond to all at once after returning from vacation. (703:10-14, 709:23-25). He further asserted that no one from the Union called to tell him that he had failed to provide the information requested in Jones' letter, and that he did not realize that he had failed to provide the Union with the information it requested until he learned about the Union's unfair labor practice charge alleging it. (702:1-25, 703:13-18; GCX 1(o)). Even after the Union's amended charge was filed on April 20, however, Respondent did not provide the Union with the January 3 requested information until June 2. (GCX 1(o); JTX 15).

D. Union Representatives' Visits to the Facility

In an effort to keep in contact with Unit employees during this extended period without a bargained-for contract, Union Vice President Esparza has been visiting with employees in Respondent's cafeteria just about every week day around 10 a.m. since about 2010. (68:23-69:7, 139:22-140:3, 154:23-155:3, 382:8-25, 384:6-8, 676:6-14; JTX 2, p.5, JTX 4, p.6). When the Union representatives visit the facility, they first stop by the bell desk and barista station to inform employees that they will be in the cafeteria, and then proceed to the cafeteria located in the basement of the facility. (69:22-23, 73:5-15, 383:16-384:2). There is no dispute that the Union's representatives did not check in with any member of management when visiting the facility. (140:10-12, 162:3-18).

The cafeteria, the only room Union representatives were authorized to visit without seeking Respondent's permission under the Implemented Agreement, consists of two rooms, one bigger than the other (referred to as "the large room" and "the small room"). (69:24-70:2, 79:2-4; GCX 2, GCX 3; JTX 4). The large room contains seven tables and enough seating for 28-35 people, and the small room, which cannot be accessed without first entering the large room, contains six tables and can seat 24-30 people. (70:12-71:3, 71:21-72:12; GCX 2, GCX 3). The food and buffet line is in the large room (70:24-71:1; GCX 2).

The Union visits with employees in the cafeteria at about 10 a.m., as that is when Respondent provides a meal to the employees, and thus, when a majority of employees take their lunch breaks.[6] (69:12-18; 383:5-12, 679:8-16, 727:4-728:5; JTX 1 ¶¶11, 12). Employees' lunch breaks last a half an hour, and if employees eat the meal provided to them in the cafeteria, they are required to eat the meal in that room. (728:16-17, 729:24-730:2; JTX 10). When he visits the cafeteria, Esparza usually has a co-worker with him, and he and his co-worker will typically spend about half an hour to an hour visiting with employees. (68:15-22, 69:8-11, 384:3-5). While Bhattacharyya claimed to have seen Union representatives at the facility at various times throughout the work day, he later admitted that 95% percent of the time, Union representatives visited the facility between 10 a.m. and 11 a.m. (690:20-691:5, 728:6-15).

In 2017, when co-worker Dayra Valades would usually accompany him, Esparza explained that, after checking on the Union's bulletin board, located outside of the cafeteria, Esparza and Valades would enter the cafeteria, and first check on the food that was supposed to be served at that time. (74:1-8, 381:19-382:25, 436:10-18). After checking on the food, Esparza and Valades would then interact with employees. (74:10-14, 75:6-16). During his visits in early 2017, Esparza recalled usually interacting with about 10-17 employees in the cafeteria. (75:17-20).

In addition to Unit employees, Union Representatives Esparza and Valades recalled seeing Daniel McClintock ("McClintock"), Human Resources Manager, in the room eating his lunch almost every day that they visited at that time. (75:25-77:8, 384:9-385:5, 412:10-23, 604:11-605:19, 628:12-629:15, 730:10-731:13). Esparza also noted seeing McClintock in the cafeteria during the two to three years prior to February 2017. (149:19-150:2). McClintock would usually spend about 10-20 minutes in the room. (76:23-77:8, 385:6-18). Esparza and Valades would also see Ivan Tellis ("Tellis"), Director of Housekeeping, in the cafeteria as well, though only on an occasional basis ranging from once a week to once a month. (75:25-9,

[6] Esparza testified that he has visited the cafeteria at 5 p.m. on rare occasion, but the usual time was between 10-11 a.m. (205:24-25).

77:9-13, 151:12-15, 385:19-386:14; JTX 1 ¶30). When Tellis was in the cafeteria, he would come into the room either looking to deliver a message to someone, and then leave, or he would eat his lunch. (77:17-78:24, 385:24-386:9). On occasions when the Union representatives saw Tellis eating in the cafeteria, they would see Tellis spend about 10-15 minutes in the room. (78:25-79:1, 386:16-23).

1. February 7, 2017

On Tuesday, February 7, Esparza called General Manager Bhattacharyya to ask for permission to enter the laundry room so he could hand out flyers to notify the laundry department employees about a housekeeping meeting the Union was holding. (79:5-80:5; JTX 1 ¶ 30). Mr. Bhattacharyya responded by asking Esparza if he could accompany him when he went to deliver the flyer to Unit employees. (80:6-13, 458:19-459:10).

Later that day, around 10 a.m., Esparza and Valades entered the cafeteria and saw managers and others, including Bhattacharyya, Assistant General Manager Rader, Maintenance Manager Bob Best ("Best"), Tellis, Director of Food and Beverage Leonard Esquivel ("Esquivel"), McClintock, and Director of Rooms Brandon Donnelly ("Donnelly") holding a meeting in the middle of the large room. (79:5-81:8, 387:3-25, 653:17-23, 663:9-12, 683:9-23, 764:22-765:12; GCX 4; JTX 1 ¶30). This was highly unusual, as Esparza was aware that mangers held meetings in Bhattacharyya's office on the fourth floor of the facility at around 10 a.m., and neither he nor Valades had ever seen managers holding a meeting in the cafeteria during their visits with employees. (83:25-85:5, 388:1-5). Esparza recalled being shocked, and then Bhattacharyya asked him and Valades if they wanted to be part of the meeting. (85:6-11, 164:4-6, 167:6-10). Esparza declined the invitation, and he and Valades walked over to the small room. (85:6-19).

It was in that room where they saw some laundry department employees with whom they were able to talk and provide information with respect to the Union's upcoming meeting. (85:18- 86:2, 388:12-24, 458:3-10). According to Valades, when she and Esparza said 'hi' to Unit employees in the cafeteria that day, they would say 'hi' back and then turn back to their meals. (390:13-19). As a result, Valades and Esparza spent

only about 20 minutes in the cafeteria instead of their usual minimum of 30 minutes. (69:8-11, 384:3-5, 390:12-19).

Given the abnormally chilled reception, Esparza and Valades then left the small room and told Bhattacharyya, who was still in the large room with the assorted managers that Esparza had seen earlier, that he no longer needed to go to the laundry room as he saw his members and they knew about the housekeeping meeting. (86:3-17, 102:17-22, 389:2-17).

2. February 8, 2017

The following day at 10 a.m., Esparza noticed the same managers holding another meeting in the middle of the large room. (86:21-87:9, 390:20-391:16, 683:9-684:6). That morning, Esparza asked Bhattacharyya why he was holding a meeting in the cafeteria. (87:10-17). Bhattacharyya responded, initially claiming that management had held meetings in the cafeteria many times in the past; however, when Esparza challenged that assertion, he claimed management was holding a meeting because he wanted to let employees know how good a job they were doing. (87:21-88:9). When Esparza pointed out that management was holding a meeting, Bhattacharyya added that he wanted his staff to express their appreciation, too. (88:13-18).

3. Management Stand-Up Meetings

Until the end of January 2017, Respondent's stand-up meetings, attended primarily by department heads, were held every weekday morning for 25-30 minutes starting at 10 a.m., and were mostly held in the General Manager's office when Bhattacharyya and Tokman were the General Manager. (667:6-10, 668:4-11, 671:23-672:21). At the end of January 2017, Bhattacharyya changed the start time for the meetings to 9:30 a.m. so that managers would be free at 10 to 10:15 so they could go back on the floors and assist in operations (667:24-5, 668-17-669:1, 670:14-23).

Although Donnelly and Rader testified that they had been going to the cafeteria at 10 a.m. since they started working for Respondent, this was contrary to all the other evidence establishing that both attended the standup meetings held at 10 a.m. in Bhattacharyya's office. (652:4-654:6, 663:10-664:4, 667:2-668:16, 766:13-25, 797:25-798:25). There was no evidence proffered or adduced to establish that managers had held meetings in the cafeteria at 10 a.m. prior to February 7. Further, when asked about the reasons meetings were held in the cafeteria in February, Respondent's witnesses proffered that stand-up meetings were held in the cafeteria in February for the purposes of recognizing a housekeeping employee's efforts, to break monotony for management, and to have management make sure things were clean and neat in the cafeteria. (683:9-19, 770:15-771:1).

4. Management's Continued Presence in the Cafeteria

During the Union representatives' visits after February 8, both Esparza and Valades continued visiting the cafeteria just about every weekday, and would see three to six managers in the cafeteria during their visits. (88:19-90:23, 393:5-15). The managers they would see would vary, but those observed in the cafeteria after February 8, included Bhattacharyya, Tellis, Rader, McClintock, Donnelly, Esquivel, Director of Security Charles Seldon ("Seldon"), and Best. (89:2-24, 90:13-24, 92:16-22, 393:10-394:8, 653:17-21, 653:24-654:12, 655:23-657:2; JTX 1 ¶30; RX 7). The managers would be in the cafeteria when the Union representatives arrived, and would still be in the room when they left about half an hour later. (90:10-16, 226:23-227:3).

5. Effects of Management's Presence in the Cafeteria After February 7

According to Esparza and Valades, with the exception of the first week of March and a week beginning at the end of April, the Union representatives saw managers in the cafeteria just about every day they visited after February 8. (90:20-92-15, 186:1-4, 393:10-15, 395:6-396:8). The managers were witnessed as being in the large room, and the small room, with some sitting together with other managers, and some sitting with, and trying to talk to, employees. (93:25-94:6, 394:2-22).

Now, when Esparza interacted with employees in the cafeteria, he noticed that some would turn their heads to see if someone was behind them and, on average, members would not talk with him as much as they did before February 7. (106:12-108:6). Further, prior to February 7, employees would greet Esparza in a loud voice, but started talking only in whispered tones after February 7. (112:24-114:6, 414:19-415:7). Similarly, Valades also noted that fewer employees would talk with the them than prior to February 7, and the nature of the conversations changed as well. (412:24-414:21). Specifically, Valades noted that the conversations after February 7 consisted mostly of small talk, as opposed to matters of substance. (415:11-20).

E. Respondent Threatens to Modify Article IV Again

On February 22, the Union filed an unfair labor practice charge against Respondent concerning the increase in managers in the cafeteria, which was served on Respondent the following day. (GCX 1(k), GCX 1(l)). By letter dated March 2, 2017, approximately a week after the Union filed its charge alleging, *inter alia*, management surveillance in the cafeteria, Respondent sent a letter to Jones proposing to modify Article IV. (GCX 1(k); JTX 9; RX 13).

Similar to what happened in 2015, Respondent's proposal sought to modify Article IV as follows:

> Business representatives or other authorized representatives of the Union shall be permitted to visit the premises of the Employer on Tuesday and Friday between 10:00 a.m. and 11:00 a.m., provided such representatives first make advance arrangements with the General Manager or his designee. When visiting the Hotel, the Union representative shall sign in and out on a log maintained by the Employer at the front desk. The Union representative shall print and sign his name and record the time he entered and left the Hotel. When the Union representative notifies the General Manager in advance of his desire to visit the Hotel, the General Manager will make a room available for the Union representative to use. Meetings by the Union representative with Hotel employees shall be limited to the room made available to Union by the General Manager unless other arrangements are made with the General Manager.

The letter ended by stating that Respondent proposed to implement the changes to Article IV effective March 17, and would do so absent a request from the Union to bargain by March 10. (JTX 9; RX 13).

At the time these changes were proposed, there was no limitation on the days and times Union representatives could visit the facility, no requirement that the Union provide advance notice to anyone, no requirement that Union representatives sign in and out, and no requirement that the Union meet with Unit employees in a room other than the cafeteria. (JTX 2, p.5, JTX 4, p.6, JTX 9).

Bhattacharyya admitted to being aware that the Union's unfair labor practice charge had been filed, but denied making his proposal had anything to do with the charge, and instead had to do with past incidents involving the Union placing flyers under every guest door at the facility, and Union representatives being seen in locations outside of the cafeteria. (693:4-694:4). Bhattacharyya went onto explain that he started looking into making changes to Article IV in mid-January, and after consulting with counsel, started working on a draft proposal in early to mid-February. (693:9-694:4). Notably, with the exception of adding a sentence limiting which days and times the Union could visit the facility, and the omission of the last two sentences of the proposal, this is the same exact language Respondent threatened to implement in July 2015. (JTX 9; RX 13).

Bhattacharyya further attempted to explain his delay in sending his proposal to the Union by claiming Respondent was waiting to secure a refinancing loan and was concerned about potential interference in securing the refinancing. (694:10-695:24, 741:14-22). Bhattacharyya later clarified his testimony to explain that Respondent was skeptical that the Union might put barriers in the refinancing process, but later admitted he didn't believe the Union had any knowledge about Respondent allegedly going through a refinance process in January, February, or March 2017. (737:8-738:3, 746:14-19).

Bhattacharyya sent another letter to the Union on March 3, relaying an alleged complaint filed by Unit employees about Union representatives' conduct in the cafeteria. (JTX 10). Bhattacharyya's letter states that the cafeteria is a place where employees can spend personal time as they please without being badgered or bothered by anyone, and asked that the Union respect the free time of the Unit employees and respect

the "decorum" of the cafeteria. (JTX 10). After receiving Respondent's threat to alter the language of Article IV, the Union notified Respondent that it wanted to bargain. (231:5-232:12; JTX 9).

F. 2017 Negotiations

The parties met to bargain in a banquet room on the first floor of the facility on April 21. (232:13-16; JTX 1 ¶16). Union Organizer David Glaser ("Glaser"), as well as Jones, Esparza, Valades, Union Boycott Coordinator Audrey Saylor ("Saylor"), and several dozen Unit employees were present for the Union, and Bhattacharyya and Respondent's then-attorney Bill Evans ("Evans") was present for Respondent. (228:20-24, 232:17-233:1, 552:7-11). During the bargaining session, the parties discussed Respondent's proposal to change Article IV, with Evans asserting that it was disruptive for the Union representatives to be in the cafeteria, and noting the complaints allegedly made by employees about the Union in the cafeteria. (316:17-317:10; JTX 10; RX 10). Evans and Bhattacharyya also cited the Union's charge against Respondent based on managers being in the cafeteria as being a reason for Respondent's proposal to alter Article IV. (RX 10 pp.1-3).

Glaser asserted that such a change would have a negative impact on the already difficult relations between the parties, and that such change would pose a practical and logistical burden. (233:2-16, 234:8-12, 717:23-718:18; JTX 9). Specifically, Glaser noted that having employees go to a different room to meet with their Union representatives, as would be the case with Respondent's proposal, would force employees to eat extremely quickly, leading to employees choosing not to go to that room. (233:16-18; JTX 9). He also pointed out that, with management in the cafeteria, it would be intimidating for employees to leave the cafeteria to go to the room, and that, while the Union would certainly take Respondent's concerns into account, the Union had been in the cafeteria for 30 years and it had worked well for both parties. (233:16-20, 234:13-16). Evans' response to the problems Glaser pointed about Respondent's proposal was that Respondent didn't see any of those problems as being significant and that Respondent's proposal was a good one. (233:21-23).

Glaser also stated during this bargaining session that the Union believed the parties' bargaining impasse had been broken, and that the Union wanted to bargain on a range of key aspects to a successor agreement. (233:6-10). Glaser talked about how circumstances had changed since 2009, specifically raising healthcare, housing and the profitability of the facility. (234:2-5). Evans responded that the impasse was still in place and that Respondent only wanted to bargain about its access proposal. (234:5-7). Toward the end of the session, Glaser reiterated the Union's position that the impasse had been broken, and that he would be getting Mr. Evans an information request. (234:19-24). Evans indicated that Respondent would be responsive. (234:24-25).

1. The Parties' Positions on Impasse

Following the bargaining session, Evans sent an e-mail message to Glaser on April 29, inquiring whether the Union wanted to continue bargaining and, despite the proposal Respondent was advancing to limit Union Representative's access rights, asking that the Union refrain from making comments during bargaining sessions that reinforced a negative image of ownership. (JTX 11). Glaser admitted that he had made a comment about Respondent being bottom feeders or bad people at the table in the context of the parties' difficult, contentious relationship, and what he saw as Respondent's confrontational, draconian and extreme proposal to change Article IV. (236:2-238:6, 346:10-347:23; JTX 11; RX 10). Glaser responded to Evans' e-mail message stating that the Union did want to continue bargaining and was in the process of getting Evans a more formal response. (JTX 11).

Citing Unit employees' wage freeze, loss of health insurance, and health and safety concerns, among others, the Glaser explained that the Union's goal in this round of negotiations with Respondent was to reach a successor collective bargaining agreement. (278:1-24, 743:20-25). In a detailed letter dated May 8, Glaser communicated to Evans the Union's position as to why the parties were no longer at impasse, and the Union's position that the parties would need to bargain over the unresolved issues that kept the parties from reaching a successor agreement. (276:15-278:3; JTX 12). Among the reasons highlighted in the letter was the

passage of time since Respondent had implemented parts of its proposal in 2009, and the changes made to employee health benefits in 2014, as well as the profitability of the hotel, the cost of living Respondent's employees have had to endure, and health and safety issues that had not been fully discussed by the parties at the bargaining table. (JTX 12). Glaser proposed that the parties set aside two consecutive days in Anchorage in mid-to-late June to continue bargaining. (JTX 12).

Glaser explained that he proposed the parties' next bargaining session for June because the Union, at the time, was planning to send Respondent a request for healthcare, wage and other information, and wanted to be able to develop bargaining proposals on the key issues that had led to the parties reaching impasse in the past. (241:15-24). Glaser also cited his and Union attorney Dmitri Iglitzin's ("Iglitzin") travel schedules as a reason for seeking to schedule the next session in June. (235:14-20, 241:24-242:4).

Evans responded to Glaser's letter on May 11, arguing that Glaser had not provided evidence of actual changed circumstances that would suggest that the parties were no longer at impasse, and asserted that he was not aware of any actual changes in the position of either party suggesting that additional bargaining was warranted. (JTX 13). He noted that, because Respondent did not agree to broaden negotiations, half a day should be more than sufficient for the parties to fully negotiate over the only issue Respondent wanted to negotiate. (JTX 13). Five days later, on May 16, Glaser responded to Evans with a detailed information request so that the Union could formulate bargaining proposals on wages, medical coverage, housekeeper workload, and other matters. (242:13-19, 280:1-281:18; JTX 14).

2. Respondent's Managers' Continued Presence in the Cafeteria

In May, while the parties were engaging in their back and forth about what the scope of negotiations would be, Esparza and Valades continued encountering managers Bhattacharyya, Seldon, Esquivel, Best, Donnelly, Tellis, McClintock, and Rader in the cafeteria, eating and sometimes talking with each other or employees in different parts of both the large and small rooms. (94:18-95:6, 397:16-399:2). On or about May 9, Esparza witnessed Bhattacharyya in the large room talking with a Sudanese employee, Maki Maki,

by the Pepsi machine. (95:7-96:6; RX 7). After witnessing this interaction, Esparza went into the small room to talk with employees, but then noticed McClintock had followed him into that room. (97:1-17, 399:3-400:2).

On about May 30, Esparza and Valades spoke with J-1 visa employees in the large room about an upcoming rally the Union was going to be holding. (97:23-99:5, 400:7-401:1). Esparza recalled talking with five J-1 visa employees about the rally, and having noticed that Bhattacharyya was behind him after he spoke with employees. (97:23-99:5). Bhattacharyya asked Esparza, in the presence of the J-1 visa employees, if he could come to the Union's rally. (99:6-19, 192:22-193:5; RX 7 p. 4). Esparza responded that Bhattacharyya could come to the rally if he wanted to and then Esparza proceeded to walk into the small room, where he saw three J-1 visa employees eating pizza that they brought from home. (99:13-100:6).

Esparza introduced himself, handed out flyers for the Union's rally and told the workers it would be nice if they came to the rally. (100:7-10). After he spoke with the employees about the rally, he heard Bhattacharyya behind him, asking the J-1 visa employees if he could have some of their pizza, and telling them that he didn't care if Esparza made fun of him. (100:11-101-3). Valades, who remained in the large room, recalled seeing Bhattacharyya follow Esparza into the small room. (401:7-11).

Around the end of July, fewer managers were present in the cafeteria during the Union representatives' visits than were in the cafeteria prior to that time. (444:23-6, 478:6-485:12). By 2018, the number of managers appearing in the cafeteria was reduced to about only two or three. (114:15-17). However, employees would still occasionally look around before talking with the Union's representatives. (115:15-17).

3. The Parties' Continue to Debate the Scope of Negotiations

On June 5, Evans provided some of the information requested by Glaser, and in his accompanying letter stated, despite not discussing bargaining positions with the Union during or after the April 21 bargaining session, that it did not appear that either the Union's or Respondent's position has changed with respect to wages or other terms and conditions of employment since reaching impasse. (243:10-18, 281:25-282:2; JTX

16). Evans' letter concluded with offering to bargain over dues check-off, as a showing of good faith, in response to a statement in Glaser's May 8th letter about the desire not to just bargain over one disputed issue. (JTX 12, JTX 16).

By letter dated June 27, Glaser informed Evans of the items that had not been provided in response to his information request and noted the Union's confusion as to how Evans could make the statement he did about the Union's position regarding the terms and conditions of employment since reaching impasse. (281:25-282:2, 283:1-10; JTX 19). Glaser also took issue with Evans' offer to bargain over dues check-off as a showing of good faith, as the Union was not aware there was any disagreement on that issue. (JTX 19). The letter ended with Glaser stating that he disagreed with Evans' assertion that only half a day was necessary for the parties to bargain, but would agree to bargain with Respondent for a half a day on either August 3 or 4. (JTX 19).

Evans responded a couple of days later by agreeing to meet with the Union on August 3 and 4, and explaining that he proposed dues checkoff because it was not included in the Implemented Proposal. (JTX 20). Between July 17 and July 31, Evans provided the information that was missing from Respondent's original proffer, and responded to additional requests relating to the four issues previously identified by Respondent as leading to the impasse: number of rooms to be cleaned by room attendants, wages, health care, and successor and assigns language. (283:23-290:16, 372:17-374:3; JTX 5, 21, 22, 24-26, 28-36).

4. Respondent Bans the Union's Interns from the Facility

A part of the Union's Organizing Beyond Barriers program, the Union's summer interns traditionally assisted the Union in speaking with Respondent's J-1 visa employees. (256:23-257:20). There is no requirement in Article IV that the Union seek permission before having its representatives access the facility and, according to Glaser, the Union did not seek permission to bring summer interns to the facility. (257:21-258:1; JTX 2, JTX 4). Despite this, at the same time the parties were corresponding about bargaining sessions and information, Respondent notified the Union in an e-mail message dated July 27 that the Union's

summer interns would no longer be permitted to accompany Jones or Esparza on their visits to the facility. (JTX 27).

Respondent's rationale for banning the Union's summer interns from the facility was that they were found to be trespassing at the Anchorage Marriott Hotel, and engaging the housekeeping staff, during their work hours, in conversations regarding the terms and conditions of their employment. (JTX 27). Respondent's knowledge of what allegedly occurred at the Marriott is derived from statements and pictures provided to Bhattacharyya from the General Manager of the Marriott. (712:1-713:23). Although that alleged problem was at the Marriott and there is no evidence of there being any problems caused by the Union's summer interns at Respondent's facility, Bhattacharyya claims he made the decision to bar the Union's summer interns from the facility for reasons relating to the safety and security of Unit employees. (714:1-715:2).

Despite the history of not needing permission to enter, Bhattacharyya testified that he had declined a request from Esparza to bring four to six summer interns with him, but did grant permission for Esparza to bring two summer interns to the facility. (710:1-20). Whether this is true or not, it is undisputed that Respondent had not contacted or attempted to negotiate with the Union prior to barring summer interns. (740:25-742:2).

5. The Parties Meet for Their Second Bargaining Session

On August 3 and 4, Glaser, Jones, Esparza, Valades, Saylor, Iglitzin and Unit employees met to bargain with Evans, Bhattacharyya, Rader, and McClintock. (243:19-244:10; GCX 5). During the August 3 and 4 bargaining session, the Union represented a willingness to make substantial movement, including that moving off of its prior position that Respondent's employees be paid the same wage rate as the employees at the Captain Cook hotel (a high-end Union hotel described as the premier hotel in Anchorage), and that the Union was no longer insisting that Respondent re-enroll in the Union's Trust Fund. (366:5-9; GCX 5; JTX 5, JTX 37; RX 11). It was during the discussion of wages that Evans acknowledged that ten years without a

wage increase, as was the case with the Unit employees, was unreasonable on its face. (251:20-252:5; JTX 39).

While the parties were reviewing the terms and conditions of employment for Unit employees, it became apparent that Respondent had been working off a contract document with the date "3-11-16" printed on it (the "3-11-16 document"). (249:2-5; JTX 6). The Union had not seen this document before attending the bargaining session and, when the Union asked Respondent about it at the session, none of Respondent's representatives were able to explain where the document came from. (249:2-12, 250:7-16; JTX 6). The parties then spent most of the August 3 and 4 session reviewing the expired collective bargaining agreement, the Implemented Agreement, and the 3-11-16 document against the current practices in effect at the facility. (254:2-19; 557:18-558:18; JTX 2, JTX 6, JTX 37, JTX 39).

With respect to Respondent's access proposal, the parties spent time discussing the reasons behind the proposal, as well as actions the Union was willing to take to address the concerns raised by Respondent. (GCX 5, JTX 37, JTX 39). Specifically, the Union stated at the bargaining session that it would be willing to agree to give Respondent notice before making use of access rights that were outside of the practice of Union representatives accessing the cafeteria, and would seek permission prior to engaging in highly unusual conduct that could be seen as going beyond mere access to the facility. (JTX 39). Despite there being no such requirements in Article IV as it appeared in the both the Implemented Agreement and the 3-11-16 document, Respondent dismissed the offer, commenting that the proposals went without saying and that providing notice and seeking permission should be happening already. (JTX 37, JTX 39).

There was also a request by the Union at the bargaining table for the names of the employees who had allegedly complained about Esparza's conduct in the cafeteria. (252:1-17; JTX 10). The Union was seeking this information as it wanted to check the accuracy of the allegations and, as the claim was that the Union's members were unhappy with Esparza, the Union believed it had an obligation to talk with its members about what was on their minds. (252:21-253:3). In addition to discussions at the bargaining table,

Respondent also showed the Union the room on the first floor, as opposed to the basement of the facility where the cafeteria is located, it was proposing that its representatives meet in to talk with Unit employees. (558:22-559:3, 718:2-18; RX 32).

Following the bargaining session, the parties exchanged letters providing summaries of what had occurred during the August 3rd and 4th bargaining session, on August 5 and 9, respectively. (JTX 37, JTX 39). The Union's letter went into detail, pointing out the discrepancies between the current status quo, and the language in the expired collective bargaining agreement, the Implemented Agreement and the 3-11-16 document, including the fact that Respondent was paying some workers less than the amounts set forth in the expired collective bargaining agreement. (JTX 2; JTX 6; JTX 39). The Union's letter reiterated its request for the names of the employees who allegedly complained about Esparza's conduct in the cafeteria, and pointed out that, based on Evans' acknowledgment about the employees having gone ten years without a wage increase, it assumed Respondent would not give a flat out "no" in response to its wage proposal. (JTX 39).

6. Respondent Refuses to Provide Information

Evans responded to Glaser's letter on August 17, by communicating that he would not provide the Union with the names of the employees who allegedly complained about Esparza's conduct in the cafeteria, based on a purported fear of retaliation from the Union. (JTX 42). Respondent did not provide any evidence for this alleged fear or offer to bargain with the Union over providing this information, or over an accommodation that would meet both parties' needs. (253:4-12; JTX 42). Notably, Evans' letter did not dispute the accuracy of Glaser's August 9 letter, but made sure to confirm that Respondent has not changed its position on wages, health care, the 17-room cleaning requirement for room attendants, or successorship; it also clearly stated that it would be a mistake to conclude that Respondent's willingness to bargain signaled an intention to offer its own proposals on those issues. (JTX 42).

By e-mail dated August 22, Glaser followed up on the Union's request for the names of the employees who allegedly complained about Esparza's conduct, explaining that, as Respondent was citing these complaints as a reason for its proposed changes to Article IV, the Union needed to conduct its own investigation regarding the complaints to be able to address Respondent's concerns. (296:14-23; GCX 6). There is no evidence that Evans responded. In March or April 2018, during the investigation into the unfair labor practice charge filed by the Union against Respondent over the refusal to provide the requested information, Respondent asserts it provided the information to the NLRB; however, Respondent did not provide this information to the Union until March 20, 2019. (599:18-21, 600:23-601:14, 624:23-625:5; JTX 1 ¶29)

7. Union Cancels October Bargaining Session

By letter dated October 16, Glaser notified Evans that the Union was cancelling the parties' bargaining sessions scheduled for October 24 and 25, based primarily on Respondent's terminating the employment of a Bill Rosario ("Rosario"), an active Union supporter who was on the bargaining team. (255:8-17, 560:20; JTX 44). The Union was upset about Rosario's termination and, in his letter, Glaser explained that those who had attended the April and August bargaining sessions did not want to meet with Respondent to bargain, as they believed Rosario's termination was retaliatory. (255:18-23, 292:8-293:12; JTX 44). In his letter to Evans, Glaser also expressed a desire for the cancellation not to significantly delay the parties' efforts to reach agreement on the issues set forth by the parties; towards that end, he included a proposal on wages for Respondent to consider that proposed wage rates significantly less expensive than those presented by the Union in prior negotiations in 2009 and 2014. (258:14-259:3, 294:11-16; JTX 44).

Rather than providing a response to the Union's wage proposal, Evans instead sent a letter to the Glaser dismissing the reasons set forth in Glaser's letter for cancelling the bargaining session, and accusing the Union of trying to delay bargaining. (259:4-6; JTX 45). Without any seeming recognition of how the aggressive nature of Respondent's conduct or proposals had affected the relationship between the parties,

Evans claimed to have been irked at the time, and referred to Glaser's claims as being "cloyingly self-righteous" and destructive. (591:13-593:4; JTX 45). With respect to the Union's wage proposal, Respondent did not respond other than to say that it would not be negotiating via e-mail. (561:1-6; JTX 45).

A few days later, on October 20, Glaser responded to Evan's letter, calling him out for the vitriol it contained, and pointing out how, in light of the effect Rosario's termination[7] has had on the bargaining team, meeting face to face at that time would be counterproductive. (JTX 46). Glaser also pointed out how there was nothing stopping the parties from exchanging written proposals, and that the Union hoped to receive a meaningful counterproposal from Respondent. (JTX 46). Lastly, Glaser argued that, rather than the Union acting in bad faith, it was Respondent, in light of its failure to make any proposals other than on access, that was acting inconsistent with demonstrating any genuine interest in negotiating a successor agreement. (JTX 46).

Evans responded to Glaser's letter on October 23, pointing out that the vitriol contained in his prior letter was intentional. (JTX 47). Specifically, Evans, asserted that it was the Union's decision not to strike in 2009, but instead to engage in a boycott of Respondent's facility, that was what led the parties to a "war of insurgency;" and that the Union's continued boycott was unlikely to lead either party to change positions anytime soon, specifically stating that "it [was] difficult to fathom increasing any benefits while the Union is engaged in a vigorous campaign to financially harm the Hotel." (JTX 47).

8. The Union Presents Proposals to Respondent

By letter dated November 21, Evans notified the Union that if it refused to engage in further negotiations, Respondent would be implementing its access proposal on January 1, 2018. (594:8-18; JTX 9, JTX 48). As a result of this ultimatum, the Union agreed to meet with Respondent to continue negotiations, with the next bargaining session taking place on December 20. (259:7-18; JTX 49).

[7] On November 14, 2019, in *CP Anchorage Hotel 2, LLC, d/b/a Anchorage Hilton*, JD(SF)-39-19, Administrative Law Judge Mara-Louise Anzalone determined that Bill Rosario was not discharged for engaging in Union activity. This, however, was not known at the time of the bargaining, during which his discharge was thought to be unlawful.

On December 20, Glaser, Iglitzin, Jones, Esparza and Valades met to bargain at the facility with Evans and Rader, who had assumed the position of General Manager by that time. (259:16-260:5; 562:5-7; JTX 1 ¶30). Unlike at the prior two bargaining session, the Union, concerned over members' comfort level being at the bargaining table after Rosario's termination, did not invite Unit employees to attend this bargaining session. (297:20-298:20). The Union presented Respondent at this bargaining session with proposals on wages, healthcare, the number of rooms to be cleaned for room attendants, successorship and access. (297:10-20; JTX 50). Each of the proposals made by the Union represented changes from the Union's prior positions. (298:25-306:3, 364:20-366:7, 376:12-378:24, 561:11-23; JTX 5, JTX 50).

With respect to Respondent's proposal to alter Union access, the Union offered a counterproposal that attempted to address a number of the concerns raised by Respondent as motivating its proposal to alter Article IV. (306:4-307:22; JTX 39, JTX 50, p.6; RX 15). Among other things, the Union agreed that its representatives would provide notice to the General Manager when visiting the facility, that it would sign in and sign out, and that it would not unnecessarily interfere with non-Unit employees' use of the break room, or hold demonstrations, or engage in other activities in the facility without permission. (JTX 50, p. 6). With respect to its proposal on successorship, the Union's removed language present in the parties' expired agreement stating that compensation and payment due to employees or the Union would be deemed trust funds, as well as language stating the priority of claims in the event of any transfer, sale, receivership or bankruptcy. (JTX 2, p. 25, JTX 50, p.5). Glaser explained that the Union made this proposal in hopes it would be less unappealing to Respondent. (378:3-23).

As for the Union's proposal on the number of rooms housekeeping room attendants would clean, the Union moved off of the standard it sought to achieve in Anchorage by insisting that room attendants be assigned to clean no more than 15 rooms, and proposed instead that room attendants receive additional pay for cleaning more than 15 rooms. (366:10-368:6; JTX 50, p.4). Similarly, the Union's proposal on healthcare no longer included insistence that Respondent agree to the Union's trust, and the Union's wage proposal

consisted of modest increases beginning with a $.50 per hour increase for all non-tipped employees, and that Respondent adjust the wages of the dishwasher/steward, whose wage rate in 2017 was actually lower than that paid in 2008. (JTX 2, p. 18; JTX 50, pp.1-3). Glaser noted that the wages being paid by Respondent were far behind those being paid at the Captain Cook hotel and that, while the Union hoped to get to Captain Cook wages at some point, it was not expecting to get to Captain Cook wages in the first year of a successor agreement. (365:6-20). This was not the case when the parties bargained in 2014. (JTX 5).

After the Union submitted its proposals, Evans and Rader took a brief caucus. When they returned, Evans told the Union that Respondent could not make a counterproposal on wages in light of the Union's boycott of the facility. (261:5-262:2, 263:1-12; JTX 51). Respondent's position with respect to wages did not change even after the Union pointed out that the boycott would end upon the signing of a collective bargaining agreement. (261:25-263:6, 263:1-12; JTX 51). Respondent did not make counterproposals to any of the Union's proposals, or point out aspects of the Union's proposals it found objectionable. (307:23-310:10).

9. Respondent Prematurely Declares Impasse

About a week and a half after the parties' bargaining session on December 20, Glaser sent a summary of the negotiations to Evans and asked, despite Evans' statements at the bargaining table concerning Respondent's only desire being to implement changes to the access proposal, that Respondent consider the Union's proposals. (JTX 51). Evans responded to Glaser's letter on January 5, 2018, summarizing the entire course of the parties' negotiations from Respondent's perspective. (JTX 52). Evans then explained Respondent's position on each of the proposals submitted by the Union at the December 20, bargaining session, noting how he understood that, from the Union's perspective, its proposals represented significant movement, but how Respondent viewed them as merely symbolic. (JTX 52). Evans rejected each of the proposals, without making any counter proposals. (JTX 52).

With respect to wages, Evans reiterated Respondent's position that, in light of the animosity-laden relationship, and Union's reactions and activities taken with respect to Respondent's conduct, Respondent was refusing to change its position. (JTX 52). Specifically, Evans states "[a]ccordingly, while we are always willing to meet and negotiate in good faith the terms and conditions of the Hotel employees, we are not willing to change our considered positions in the absence of a respectful and good faith partner." (JTX 52). Finally, Respondent rejected the Union's counter proposal, drafted specifically to address concerns raised by Respondent with respect to access, insisting that Respondent would not agree to a proposal unless the Union agreed to give up access to the cafeteria. (JTX 52).

Evans concludes his letter by stating that the parties are at an impasse, that Respondent is not willing to continue allowing Union access to the cafeteria, and that it was Respondent's intention to implement its proposed changes to Article IV on January 15, 2018. (563:11-19; JTX 9, JTX 52). There were no further bargaining sessions between the parties after Evans sent his letter to the Union. (240:10-15).

Glaser explained that the Union did not request further bargaining after receiving Evans' letter, as Respondent referred to the Union as bad faith bargaining partners and said it would not bargain. (264:19-25; JTX 52). The Union filed an unfair labor practice charge against Respondent on January 10, 2018, alleging, *inter alia,* that Respondent was bargaining in bad faith by ceasing negotiations and informing the Union that it would be implementing its proposed changes to Article IV. (GCX 1(y)). Despite the Union filing this charge, Respondent went ahead with its plans to unilaterally change Article IV.

G. Respondent Unlawfully Implements Changes to Article IV

By e-mail dated January 12, 2018, Rader notified Jones, Esparza and Valades that Respondent was implementing its proposal on January 15, 2018, and asked that the Union representatives contact him in advance to let him know when the Union's representatives would be at the facility. (773:8-774:9; JTX 9, JTX 53). On January 16, 2018, Esparza and Valades came to the cafeteria at the facility, without contacting Rader in advance to announce they would be visiting. (774:13-6). Once there, Rader asked Esparza and

Valades to step outside the cafeteria, and explained that, in accordance with the requirements of the implemented access proposal, they needed to notify Rader ahead of time when they visited. (775:1-22). Valades and Esparza continued coming to the cafeteria after Respondent unilaterally implemented its proposal, and Rader continued explaining to the Union representatives that they had to follow the newly changed proposal. (777:10-778:13)

On January 22, 2018, Valades, Esparza and Jones visited the facility around 10 a.m. (406:13-21). The Union representatives went through the lobby, and on their way downstairs to the cafeteria, Donnelly, who was the Director of Operations at that time, stepped in front of Jones and told the representatives they couldn't be there. (406:22-407:5; JTX 54). Jones stated that the representatives were there to visit with their members, and then the group proceeded to walk around and past Donnelly. (407:2-20). Shortly after getting to the cafeteria, Rader arrived, and called Jones outside the cafeteria. (407:21-24, 778:14:20).

Jones then went to talk with Rader, while Esparza and Valades talked with Unit employees in the cafeteria. (407:25-408:7). Rader told Jones he had gone over the steps to follow to comply with the newly changed proposal with Esparza and Valades, and that he was going to have to ask Jones to leave. (778:21-24). Jones told Rader that he wasn't going to leave until after he was done meeting with his members. (778:25-779:1). Jones then returned to the cafeteria, and after the Union representatives had been in the cafeteria for about half an hour, the Union representatives left without further incident. (69:8-11, 384:3-5, 408:6-9, 779:1-3).

By letter dated January 22, 2018, Rader reviewed with Jones the fact that, despite Respondent having changed its access proposal, the Union had not been abiding by it. (780:10-16; JTX 54). Rader warned that if the Union did not abide by the language of the newly changed access proposal, and continued accessing the facility without Respondent's permission, it would be viewed as trespass and Rader would have no other option but to involve law enforcement. (JTX 54). A few days later, on January 25, 2018, Jones responded to Rader's letter, asserting the Union's position that Respondent was not permitted to implement

its change to the language of Article IV, and referencing the unfair labor practice charge that the Union had filed on the matter, and explaining that, until Respondent was able to persuade the Labor Board or a federal court that Respondent could implement its change, the status quo would remain unchanged. (564:1-14; GCX 1(y); JTX 55).

H. Respondent Summons the Anchorage Police Department

At 10 a.m. on January 31, 2018, Valades visited the cafeteria at the facility with co-worker Saylor. (401:12-402:2). After speaking with some employees in the cafeteria, Valades and Saylor left the facility and went to the Union's office. (402:3-15). Valades had not been asked to leave the facility by anyone. (402:10-12).

Around 3 p.m. that day, two Anchorage Police Department officers came to the Union's office looking for Jones. (402:18-403:5). Valades explained to the officers that Jones was out of town, and that the person next in command at the Union, Esparza, was not in the office at that time. (403:6-13). After letting the officers know that she was the only person in the office, the officers then proceeded to ask Valades if she had been at the hotel that day. (403:14-20). The officers explained that they had been dispatched to the hotel on a trespass call, and that they had been given a letter claiming there was an agreement stating that the Union would not be at the hotel. (404:10-22).

Based on her belief that the officers were referencing a letter sent to the Union by Rader on January 22, 2018, explaining that Respondent was implementing the changes it proposed to Article IV, Valades then provided a copy of a letter from Jones on January 25, 2018, challenging the legality of Respondent's implementation of its changes to Article IV, in response. (404:25-406:7; JTX 54, JTX 55). The officers read Jones' letter, and before leaving the Union's office, handed Valades a business card with the police report number and the date, written on the back of it. (408:15-410:11; GCX 7).

Valades secured a copy of the police report from the incident, in which it was revealed that Respondent wanted a trespass notice issued to the Union. (410:21-411:14; GCX 8). Rader, who admitted to being the person who summoned the Anchorage Police on January 31, 2018, explained that the police communicated that they were not going to be taking any action at that time. (567:7-11, 781:3-15, 782:18-784:10). After that day, Respondent ceased asking the Union representatives to leave the facility. (784:10-12).

Jones notified Unit employees at a quarterly meeting on April 19, 2108, about the Anchorage Police Department having visited the Union hall. (823:5-824:6).

I. Settlement Agreements

On January 24, 2018 , the Office of Appeals confirmed the Regional Director's decision to unilaterally approve a Settlement Agreement for Case Nos. 19-CA-193656 and 19-CA-193659. (RX 33). However, on February 15, 2018, Respondent was notified by the NLRB that the Settlement was being held in abeyance. (646:15-647:6; RX 34). Those two unfair labor practice charges were combined into a subsequent Settlement Agreement, along with Case Nos. 19-CA-203675, 19-CA-212923, 19-CA-212950, 19-CA-218647 and 19-CA-228578. Although Respondent entered into a Settlement Agreement on April 6, 2018, the Union did not enter into the agreement and, ultimately, it was not approved by the Regional Director. (RX 31).

Despite the Settlement Agreement not having been approved by the Regional Director, Evans claimed that, as a result of it signing the agreement, Respondent would agree to bargain with the Union upon receiving a request from the Union. (598:4-600:9). There is no evidence that Respondent communicated any changes to the Union in any of the bargaining or impasse positions it took in Evan's January 5, 2018 letter during this time.

J. Respondent Unlawfully Deals Directly with Unit Employees and Denigrates the Union

A couple of months later, in June 2018, the Union posted a notice, in English, on its bulletin board at the facility, concerning the Union's dispute with Respondent, encouraging employees to support the Union.

The Union's notice communicated to employees that, without the Union, Respondent would take away benefits Unit employees enjoyed such as pension, health insurance, job security, and work load. (437:5-438:9; JTX 1, ¶23, JTX 56).

Rader believed there were several items in the notice that weren't true, spoke badly about management, and misrepresented Respondent's goals. (792:8-14). Consequently, he had a notice posted next to the time clocks around the end of June 2018, in English and in Spanish, informing employees that: Respondent wants to have a direct working relationship with its employees to solve issues; Respondent does not believe having a 3rd party labor union involved is necessary; Respondent isn't anti-Union, but rather pro employee; the idea that employees without the Union could lose their pension, holiday pay, paid lunch break, job security, two 10 minute breaks, representation, seniority and other benefits was simply not true and was one of the most dishonest statements Respondent could imagine; employees at Respondent's other properties have those benefits and more, most without any union representation; Respondent believes they could achieve by working together versus having the Union; and that Respondent welcomed Unit employees to come to management with concerns they might have for solutions that are satisfactory to them. (792:2-7, 805:8-806:6; JTX 57).

Respondent claims that it maintained a notice posted next to its time clocks setting forth an Open Door Policy, prior to Rader posting his notice in June 2018. (792:19-794:12). That notice encouraged employees to communicate their ideas, suggestions and problems to their department manager on a daily basis, and encouraged them to work out problems with their immediate supervisors. (RX 42). However, there was no promise that department managers would act on employees' ideas, suggestions or problems. Further, while employees were encouraged to work out problems with employees' supervisors, such offer to resolve problems was limited to resolving misunderstandings that might occur. (RX 42).

III. ARGUMENT

A. Respondent Engaged in Unlawful Surveillance of Unit Employees and Unilaterally Changed Their Terms and Conditions of Employment

The Board has held that while an employer's mere observation of "open, public union activity on or near [an employer's] property does not constitute unlawful surveillance, engaging in observation in a manner that is "out of the ordinary," and thereby coercive, violates the Act. *See Town & Country Supermarkets*, 340 NLRB 1410 (2004); *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005); *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2006) (a supervisor's mere presence at the facility on a Saturday, which was not ordinary, constituted unlawful surveillance). Further, as established in *Remington Lodging & Hospitality, LLC d/b/a Sheraton Anchorage*, 363 NLRB No. 6 (2015), the increased presence of management in the cafeteria amounted to unlawful surveillance where union representatives conducted meetings with employees on breaktime.

Here, the unrefuted testimony was that, since 2010, Union representatives would visit and interact with Unit employees in the cafeteria at the facility at 10 a.m. Other than McClintock, whose managerial status is in dispute, but whose agency status is not,[8] and Tellis, there is no evidence that any of Respondent's supervisors or managers were present in the cafeteria, on a regular basis, until February 7, 2017, when Bhattacharyya held his stand-up meetings in the cafeteria, and then changed the start times of stand-up meetings. In fact, as a result of Bhattacharyya changing the time of the management start-up meeting to 9:30 a.m., an average of three to six managers who had not previously been in the cafeteria at 10 a.m., were now able to be present in the cafeteria almost every day that the Union Representatives visited, watching which employees were talking to the representatives and what they were doing.

[8] Despite the representations made to the Region during the investigation of Case 19-CA-193656 that Mr. McClintock was the Director of Human Resources or Human Resources Manager, Respondent took the position at hearing that McClintock was an HR Generalist up until July 2017, when he was promoted to the position of Human Resources Supervisor; a promotion that came with no change in his job duties or responsibilities. (412:10-23,426:15-428:16, 604:11-605:19, 626:4-11, 628:12-629:15, 687:15-690:19, 730:10-731:13, 794:15-795:13).

While Respondent claims it held stand-up meetings in the cafeteria, and changed the time of its start-up meetings for legitimate, business reasons, Respondent's motivation is not relevant as the test of whether particular employer conduct is violative of § 8(a)(1) is whether it reasonably tends to interfere with the free exercise of employee rights. *American Freightways Co.*, 124 NLRB 146, 147 (1959); *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964) (the test is concerned with the effect, or likely effect, of the employer's conduct, rather than his motive or state of mind, and no proof of coercive intent is necessarily a violation may occur notwithstanding the absence of a discriminatory or unlawful motive or antiunion animus, and even though the employer acted in good faith).

In addition to these managers being present in the cafeteria, managers sat and talked with Unit employees, and on two occasions, followed Union representative Esparza into the small room. This is another recognized violation under § 8(a)(1) of the Act. *See, e.g., Liberty Nursing Homes, Inc.*, 245 NLRB 1194, 1200 (1979) (violation found where supervisors departed from their practice of eating separately, and "deliberately mingled with employees in the dining areas utilized […] during break and lunch periods").

Further, as a result of management's increased presence in the cafeteria in starting in February 2017, the Unit employees went from being able to freely interact with their Union representatives during their lunch breaks, to being able to interact with their Union representatives only in the presence of Respondent's management team. This represents a change in past practice, over which Respondent was required to bargain. *See, e.g., Sunoco, Inc.*, 349 NLRB 240, 244 (2007) ("employer's practices, even if not required by a collective-bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of unit employees' employment, which cannot be altered without offering their collective bargaining representative notice and an opportunity to bargain over the proposed change"). There was no evidence that Respondent gave notice or an opportunity to bargain to the Union before changing this practice, making it a clear violation of § 8(a)(5) of the Act.

B. Respondent's 2017 Proposal to Restrict Union Access Was Made in Response to the Union Filing the Unfair Labor Practice Charge in Case 19-CA-193656

Based on evidence revealed at trial, the General Counsel moved at the conclusion of her case to further amend the Complaint to allege, *inter alia*, that Respondent's proposal to modify Article IV in 2017 was taken in retaliation for the Union filing the unfair labor practice charge in Case 19-CA-193656 in violation of § 8(a)(4). (509:7-511:9; GCX 11). The Administrative Law Judge properly granted this motion over Respondent's objection. (540:13-546:3).

1. The ALJ Properly Permitted the General Counsel to Amend the Complaint

A judge has wide discretion to grant or deny motions to amend complaints under § 102.17 of the Board's Rules and Regulations. *Rogan Bros. Sanitation, Inc*., 362 NLRB 547, n.8 (2015), *citing Bruce Packing Co.*, 357 NLRB 1084, 1085-86 (2011). In determining whether that discretion has been properly exercised, the Board evaluates: (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated. 362 NLRB at n.8, *citing Stagehands Referral Service*, LLC, 347 NLRB 1167, 1171-72 (2006) (post hearing amendment denied); *CAB Associates*, 340 NLRB 1391, 1397-98 (2003) (mid-hearing amendment granted).

Here, in support of the motion to amend in a § 8(a)(4) allegation, the General Counsel cited to a document entered into evidence by Respondent reflecting how Respondent had sought to modify the language of Article IV in response to Union activity in 2015. (RX 13). The General Counsel further pointed to bargaining notes, subpoenaed by Respondent from the Charging Party and entered into evidence, shedding light on Respondent's motivation behind its proposal as well as statements made by Respondent at the table. (RX 10, pp.1-3). After the General Counsel announced her intention to further amend the Complaint on the record, Respondent was able to call witnesses and address all of the General Counsel's allegations. As such, the matter was fully litigated.

2. The § 8(a)(4) Allegation is Closely Related to the Union's Charge in Case 19-CA-193656

With respect to the timeliness of the § 8(a)(4) allegation, the Board's decision in *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988), provides that a complaint may be amended to allege conduct outside the § 10(b) period if the conduct occurred within 6 months of a timely filed charge, and is "closely related" to the allegations of the charge. *Costco Wholesale Corp.*, 366 NLRB No. 9, slip op. 5 (2018). In evaluating whether the timely and alleged untimely allegations are "closely related," the Board: (1) considers whether the allegations involve the same legal theory; (2) considers whether the allegations arise from the same factual circumstances or sequence of events; and (3) "may look" at whether the respondent would raise the same or similar defenses to both allegations. *Nickles Bakery of Indiana*, 296 NLRB 927-28 (1989). In *Carney Hospital*, 350 NLRB 627, 630 (2007), the Board held that it would find that the second prong of the *Redd-I* test was satisfied where "two sets of allegations demonstrate similar conduct, usually during the same time period with a similar object, or there is a causal nexus between the allegation and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity…." *See also The Earthgrains Co.*, 351 NLRB 733, 734 (2007).

Here, the Union filed its charge challenging Respondent's surveillance in the cafeteria, and unilateral change in terms and conditions of employment on February 22, 2017. Bhattacharyya's letter to Jones, threatening to alter the language of Article IV to restrict Union representatives' access to the cafeteria unless the Union agreed to bargain, was sent approximately eight days later. Thus, the proposal was part of the same progression of events as the timely filed surveillance and unilateral change charge in Case 19-CA-193656.

3. Respondent Violated Section 8(a)(4) by Threatening to Restrict Union Access in Retaliation for the Union Filing an Unfair Labor Practice Charge

Section 8(a)(4) provides that it shall be an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

29 U.S.C. § 158(4). The Board's approach to this provision "has been a liberal one in order to fully effectuate the section's remedial purpose." *General Services*, 229 NLRB 940, 941 (1977), relying on *NLRB v. Scrivener*, 405 U.S. 117, 124 (1972). Consistent with this approach, the Board and courts have found that § 8(a)(4) is not limited solely to protecting employees who have filed charges and testified on their own behalf. Specifically, in *Vulcan-Hart Corp.*, 248 NLRB 1197 (1980) (§ 8(a)(4) violation found where plant manager told union vice president, in presence of employees, that there could be no more meetings in the lunchroom because the union had filed charges against him).

The record evidence reflects that in 2015, after Union representatives were found to have placed surveys concerning mold problems under guest room doors at Respondent's facility, Respondent proposed to alter Article IV to so that the Union representatives would no longer be in the cafeteria. While discussing this proposal, Respondent presented the Union with a number of reasons it allegedly relied upon to support its actions, including concern about interference with non-Unit employees' enjoyment of the cafeteria. After getting assurances from Jones, however, that the Union would not place surveys under guestroom doors again, Respondent agreed to table its proposal. This suggests that Respondent was primarily was motivated by the Union distributing flyers to guests. Then, in 2017, about eight days after the Union filed an unfair labor practice charge against Respondent relating to its managers being in the cafeteria, Respondent proposed an even harsher change to Article IV than it proposed in 2015.

Thereafter, when discussing its motivation for making its proposal at the parties' first 2017 bargaining session, Evans and Bhattacharyya, in the presence of employees, repeatedly told the Union that Respondent was proposing to restrict the Union's access because the Union filed an unfair labor practice charge against Respondent. Most alarming was the fact that no explanation was provided for why Respondent chose to limit the Union from, more or less, access to the facility whenever the Union representatives chose to visit, to only two hours each week. Instead, other than citing the unfair labor practice charge, Respondent provided the Union with mostly the same reasons it presented in 2015 for making its proposal.

As the evidence suggests Respondent proposed to implement restrictions to Article IV in direct response to the Union filing a charge against Respondent, and that it communicated such reason in the presence of Unit employees, Respondent violated § 8(a)(4) of the Act.

C. Respondent Unlawfully Failed to Provide the Union with Information

It is well established that an employer has an obligation to furnish a union, upon request, with information that is relevant and necessary to the Union's bargaining responsibilities. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956). This duty encompasses the obligation to provide relevant bargaining and grievance processing materials. *See Postal Service*, 337 NLRB 820, 822 (2002). The standard for relevancy is a "liberal discovery-type standard," and the sought after evidence need only have a bearing upon the disputed issue. *See Pfizer, Inc.*, 268 NLRB 916 (1984).

In addition to its obligation to provide relevant information to the Union, employers are also required to provide the information in a prompt manner. *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001), *citing Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). Thus, "[e]ven though an employer has not expressly refused to furnish the information, its failure to make diligent effort to obtain or to provide the information reasonably promptly may be equated with a flat refusal." *Shaw's Supermarkets*, 339 NLRB 871, 875 (2003), citing *NLRB v. John C. Swift Co.*, 124 NLRB 394 (1959), *enfd. in part and denied in part*, 277 F 2d 641 (7th Cir. 1960).

Here, Jones submitted a letter to Bhattacharyya on January 3 explaining that an issue had been reported to him involving the schedules of bussers and work duties of servers. He included in his letter a request for information that Respondent did not provide to the Union until approximately five months later. While Respondent may argue that Jones' information request was submitted at a time when Bhattacharyya was out on vacation, and that Bhattacharyya intended to provide the information, but as a result of the number

of requests for information submitted at the time by the Union, Bhattacharyya simply forgot, these arguments should be rejected.

First, while it is true that the Union submitted its request when Bhattacharyya was on vacation, and that it was not the only request it submitted at that time, Bhattacharyya responded to Jones' letter, and did not forget to go out of his way to point out that the name of the Respondent's restaurant had changed 11 years earlier. Further, after the Union amended its charge to include the allegation that Respondent had failed to provide the information contained in Jones' letter, Respondent offered no excuse for why it took over five weeks to provide the information it allegedly forgot to provide to the Union back in January. *International Credit Service,* 240 NLRB 715, 718 (1979) (unexplained delay of six weeks unreasonable).

Moreover, with respect to the Union's request for the names of the Unit employees who allegedly complained about Union representatives' conduct in the cafeteria, while it is settled that claims of confidentiality may justify refusals to furnish otherwise relevant information, an employer "cannot simply raise its confidentiality concerns, but must also come forward with some offer to accommodate both its concerns and its bargaining obligation. *West Penn Power Co.*, 339 NLRB 585, 589 (2003); *Tritac Corp.*, 226 NLRB 522 (1987). As Respondent flat out refused to provide the information to the Union at the time it was requested without any offer to bargain over an accommodation, Respondent violated the Act. *Pennsylvania Power Co.*, 301 NLRB 1104, 1005 (1991); *Alcan Rolled Products Ravenswood, LLC*, 358 NLRB 37, 43-44 (2012).

Finally, while Respondent did eventually provide this information to the Union, providing information to the Union over a year and a half after it was requested does not satisfy Respondent's obligations under the Act. *See Woodland Clinic*, 331 NLRB 735, 736-37 (2000) (delay of 7 weeks unjustified); *United States Postal Service*, 332 NLRB 635, 640 (2000)(delay of five to nine months excessive); *Bundy Corp.*, 292 NLRB 671, 672 (1989) (delay of over two months unreasonable, and explanation offered for delay inadequate).

D. Respondent Violated §8(a)(5) of the Act by Refusing to Bargain in Good Faith, and by Unilaterally Implementing Changes to Article IV

During the course of the parties' negotiations, the impasse that was reached in 2009 was broken. Nevertheless, Respondent failed and refused to provide any proposals outside of its proposal to alter Article IV, and in response to the Union's proposals, declared impasse prematurely, stated it would not bargain with the Union, and unlawfully implemented changes to Article IV.

E. The Parties' Impasse Was Broken

When, in the course of collective bargaining, the parties reach a lawful impasse, it does not end the parties' obligation to engage in collective bargaining, but is often merely a hiatus in bargaining. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982). As for determining that impasse has been broken, the Board does not require major changes in circumstances, but rather looks for "anything that creates a new possibility of fruitful discussions," even if it does not create the likelihood of an agreement. *Circuit-Wise, Inc.*, 309 NLRB 905, 921 (1992); *Airflow Research & Mfg. Corp*., 320 NLRB 861, 862 (1996). Even the passage of time has been found to be sufficient to break a bargaining impasse. 309 NLRB at 921, 320 NLRB at 862.

The facts here reflect that in 2014, after the parties' failed attempted to reach a successor agreement, Respondent's then counsel identified four issues on which the parties could not agree, and that were preventing the parties from reaching an agreement: wages, healthcare, the number of rooms room attendants had to clean and successorship. Further, prior to the Union submitting proposals to Respondent, Bill Evans acknowledged that employees going ten years without a wage increase was unreasonable on its face. Finally, during the parties' negotiations not only did the Union communicate with Respondent that it was prepared to make concessions and to move off of its prior positions on the four subjects identified as preventing agreement, its proposals confirmed those representations. Since the Union's "offer" was sufficient to enable a determination of whether or not it represented "any change, much less a substantial change, from the Union's prior position in negotiations with the Respondent," *Retlaw Broadcasting Co*., 324 NLRB 1148,

1151 (1997), citing *Holiday Inn, Downtown-New Haven*, 300 NLRB 774 (1990), there is no doubt that impasse was broken by the time the Union submitted its proposals to Respondent on December 20.

F. During the Course of the Parties' Negotiations, Respondent Unlawfully Barred the Union's Summer Interns from the Facility

Section 8(a)(5) prohibits an employer from making changes to material terms or conditions of employment without giving the union prior notice and an opportunity bargain regarding the change. *NLRB v. Katz*, 369 U.S. 736 (1962). A change in the parties' practice with respect to visitation by union representatives constitutes a material change. *Ernst Home Centers*, 308 NLRB 848, 848-9 (1992). Accordingly, an employer violates §§ 8(a)(1) and (5) by unilaterally altering the parties' contractual visitation provisions or practice. *See, e.g*., *J & J Snack Foods Handhelds, Inc*., 363 NLRB No. 21, slip op. at 18 (2015); *Turtle Bay Resorts*, 353 NLRB 1242, 1273 (2009). *See also Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992), *enfd*. *in rel. part NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1438 (9th Cir. 1995) (ejection of union representatives from the hotel's premises interfered with union-related communications and coerced employees in violation of § 8(a)(1) of the Act).

Here, there is a past practice of Union representatives and Union interns visiting the facility, and there is no dispute that Article IV of the expired agreement, Implemented Agreement, and 3-11-16 contract document, provides that "business representatives" or other "authorized representatives" of the Union have access to the facility. Thus, it is beyond dispute that the summer interns, acting as representatives of the Union, had the "contractual" as well as past practice right to visit the facility, and Respondent's decision to ban the summer interns, without giving the Union any notice or opportunity to bargain, violated the Act.

Moreover, while Respondent cites to the summer interns allegedly talking with housekeeping staff at a wholly different property, the Anchorage Marriott hotel, about their working conditions while on the housekeepers were on duty, such conduct by the summer interns, does not relieve Respondent of its bargaining obligations. Even if the summer interns engaged in the conduct alleged at Respondent's facility rather than the Marriott, that conduct falls far short of the conduct which would permit the Respondent to bar

them from the facility. *See Long Island Jewish Med. Ctr.,* 296 NLRB 51, 71 (1989) (union representative lightly pushing the employer's administrator, cursing at her on multiple occasions, blocking her from leaving her desk, cursing at another administrator and engaging in a shoving match with her, while distasteful, did not justify employer banning union representative from its facility). In sum, as Respondent did not bargain with the Union prior to banning the summer interns from its facility, it violated § 8(a)(5) of the Act.

G. Respondent Bargained in Bad Faith

The Board has long defined impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." *Dish Network Corp.*, 366 NLRB No. 119 (2018), *citing Taft Broadcasting Co.*, 163 NLRB 475 (1967). Both parties must believe that they are at the end of their rope." *AMF Bowling Co.*, 314 NLRB 969 (1994). The Board will not find an impasse, however, unless there is "no realistic possibility that continuation of discussions at that time would have been fruitful." *AFTRA v. NLRB*, 395 F.2d 662 (D.C. Cir. 1968). To find impasse, the Board considers, among other things, (a) the parties' bargaining history; (b) whether they negotiated in good faith; (c) the length of their negotiations; (d) the importance of the issues over which they disagreed; and (e) their contemporaneous understanding as to the state of their negotiations. *Sprain Brook Manor Rehab, LLC*, 365 NLRB No. 45, n. 59 (2017), citing *The Sheraton Anchorage*, 359 NLRB No. 95, slip op. 44 (2013) (quoting *Taft*, 163 NLRB at 478).

"Collective bargaining…is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485 (1960). Consistent with this, a party's "failure to do little more than reject (demands)" has been found "indicative of a failure to comply with [the] statutory requirement to bargain in good faith." *Excelsior Pet Products*, 276 NLRB 759, 762 (1985). Save for Respondent's half-hearted offer in the ten-month period over which the parties bargained to negotiate over dues checkoff, an issue that was not in dispute between the parties, throughout the ten-month period over which the parties bargained, Respondent

repeatedly made clear that, while it would consider the Union's proposals made on the issues that were in dispute, its only interest was being able to implement the changes to its access proposal.

Such conduct, known as "piecemeal" or "fragmented" bargaining, does not satisfy Respondent's obligation to bargain in good faith, as it is "well settled that the statutory purpose of requiring good-faith bargaining would be frustrated if parties were permitted, or indeed required, to engage in piecemeal bargaining. *Bridon Cordage, Inc.*, 329 NLRB 258, 265 (1999) (Citation Omitted); *E.I. Du Pont & Co.*, 304 NLRB 792, n.1 (1991). For such an approach excludes "the opportunity to engage in the kind of 'horse trading' or 'give-and-take' that characterizes good-faith bargaining." *Bridon Cordage, Inc.*, 329 NLRB at 265, citing *Endo Laboratories, Inc.*, 239 NLRB 1074, 1075 (1978). As such, Respondent violated § 8(a)(5) of the Act by bargaining in bad faith.

H. Respondent's Declaration of Impasse Was Unlawful

When a party's unfair labor practice impede the progress of the parties' negotiations, the Board will find that no lawful impasse can be reached. *See Majestic Towers, Inc., d/b/a Wilshire Plaza Hotel*, 353 NLRB 304, 304-05 (2008) (*citing Caldwell Mfg. Co.*, 346 NLRB 1159, 1170 (2006)). The central question is whether Respondent's unlawful conduct detrimentally affected the negotiations over a new collective-bargaining agreement and contributed to the deadlock. *In re Dynatron/Bondo Corp*., 333 NLRB 750 (2001), citing *Alwin Mfg. Co.*, 326 NLRB 646, 688 (1998), *enfd*. 192 F.3d 133 (D.C. Cir. 1999). In *Alwin Mfg.,* the D.C. circuit identified at least two ways in which an unremedied ULP could contribute to the parties' inability to reach an agreement. 333 NLRB at 752. "First, a ULP can increase friction at the bargaining table…[and second], by changing the status quo, a unilateral change may move the baseline for negotiations and alter the parties' expectations about what they can achieve, making it harder for the parties to come to an agreement." *Id.*

Here, the parties' bargaining was colored from the start both by Respondent's unlawful conduct concerning its manager's presence in the cafeteria, as well as its aggressive proposal to restrict Union access. Further, during the negotiations, Respondent revealed various unilateral changes it had

implemented to Unit employees' terms and conditions of employment and also failed to provide the Union with information relating to one of Respondent's asserted rationales for seeking to restrict Union access to the facility, unilaterally banned the Union's interns from its facility, and then terminated one of the Union's supporters.[9] Such termination of a known union activist and bargaining committee member would "tend not only to hinder the committee's ability to negotiate, but also would reasonably lead it to believe that its very existence was under attack." *Id*. at 753.

It was in the context of the conduct cited above, as well as the Union having made proposals offering concessions to Respondent in five specific areas, including the four that had led to the parties reaching impasse years earlier, that Respondent declared impasse. In its January 5, 2018, letter, Respondent flat out rejected each of the Union's proposals, while offering none of its own. Most striking was the fact that, not only did Respondent not acknowledge the Union's movement with respect to wage increases, but that it communicated the message that it did not matter what the Union proposed. That does not constitute bargaining in good faith.

In addition to this, Respondent claimed at the bargaining table that it couldn't provide a response on the Union's wage proposal due to the Union's boycott of the facility, a position that remained unchanged even after the Union pointed out that the boycott would end when the parties reached agreement. Later, in its letter to the Union, Respondent claimed it was difficult to "provide increased wages or benefits given the current animosity-laden relationship." Then, citing Glaser's comments about Respondent's ownership being bad people and Glaser's claims concerning Union supporter Bill Rosario's termination, stated that while Respondent was "always willing to meet and negotiate in good faith the terms and conditions of the Hotel employees, [it was] not willing to change [its] considered positions in the absence of a respectful and good faith partner." (JTX 52, p.9).

[9] While ultimately, Administrative Law Judge Anzalone did not find that Respondent's termination of Bill Rosario was unlawful, this does change the impact on the bargaining committee and the Union at the time the parties were in negotiations.

Such is the equivalent of arguing that Respondent's unlawful refusal to bargain in good faith and declaration of impasse is somehow justified because the Union was upset about Respondent's prior unlawful and/or offensive conduct. This is not only specious, but it has been specifically rejected by the Board. *See Wayne's Dairy*, 223 NLRB 260, 265 (1976)(an employer that has committed unfair labor practices cannot 'parlay an impasse resulting from its own misconduct into a license to make unilateral changes). Moreover, to the extent Respondent found the Union's comments to be offensive, rude or somehow unacceptable to Respondent, the Board has found that, "for better or worse, the obligation to bargain also imposes the obligation to thicken one's skin and to carry on even in the face of…rude and unacceptable behavior." *Victoria Packing Corp.*, 332 NLRB 597, 600 (2000). As Respondent had not bargained in good faith, its declaration of impasse was unlawful.

I. Respondent's Implementation of Its Changes to Article IV Was Unlawful

Unlike with the ban of the Union's summer interns, Respondent did give the Union notice and an opportunity to bargain over its proposed change to Article IV. However, Respondent not only had a duty to provide the Union with notice and an opportunity to bargain, it also had a duty to "refrain from implementation at all unless and until an overall impasse [had] been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). "The Board has recognized two limited exceptions to this general rule: [w]hen the union, in response to an employer's diligent and earnest efforts to engage in bargaining insists on continually avoiding or delaying bargaining, and when economic exigencies compel prompt action." *Id.* However, neither circumstance is present in this case.

First, while the bargaining sessions did not occur as quickly as Respondent would have liked, the evidence does not support a finding that the Union was continually avoiding or delaying bargaining. Rather, the evidence reflects that the Union diligently sought the rationale behind Respondent's proposal, and sought relevant information to formulate proposals accordingly as well as on other matters. Further, when the Union made its written proposal, it afforded some concessions (*i.e.* agreeing to give notice and to sign in and out),

and offered language addressing the purported concerns raised by Respondent. This indicates there was room for further negotiation.

Second, while Respondent did not get the Union's agreement to give up access to the cafeteria, that neither constitutes a failure, avoidance or delay in bargaining nor supports a finding of impasse or the right to implement what it wanted, given the concessions being offered. In fact, there is absolutely no evidence that Respondent was compelled to implement its proposed change to Article IV as a result of economic exigencies or emergency circumstances beyond its control. *See RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995) (an employer must show either that the circumstances required implementation at the time action was taken or the existence of a business "emergency that required prompt action").

As no exception applies and Respondent did not bargain to an overall impasse with the Union before implementing its proposed changes, Respondent's implementation constitutes an unlawful unilateral change. *J & J Snack Foods Handhelds, Inc*., 363 NLRB No. 21, slip op. at 18 (2015); *Turtle Bay Resorts*, 353 NLRB at 1273; *Frontier Hotel & Casino*, 309 NLRB at 766. *enfd*. *in rel. part NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1438 (9th Cir. 1995).

J. Respondent Violated § 8(a)(1) of the Act when It Called the Police to Restrict Lawful Union Activity

Non-employee union representatives who meet with employees on an employer's premises to discuss matters related to the employees' terms and conditions of employment pursuant to a contractual access clause are engaged in activities protected by Section 7 of the Act. *Turtle Bay Resorts*, 353 NLRB at 1242. *See also C.E. Wylie Construction Co*., 295 NLRB 1050 (1989) (union representatives' efforts to meet with employees pursuant to contractual access provision constitute the exercise of Section 7 rights). As Respondent's implementation of its changes to Article IV was unlawful, Respondent violated the Act when it contacted the Anchorage Police Department in an attempt to compel compliance with those changes. While

there was no evidence that employees became aware that Respondent called the Anchorage Police Department on the Union until the quarterly meeting in April 2018, Respondent's conduct nevertheless violates § 8(a)(1) because the conduct itself interferes with the exercise of § 7 rights. *See Roger D. Hughes Drywall*, 344 NLRB 413 (2005).

K. Respondent Dealt Directly with Employees and Denigrated the Union

An employer's freedom under § 8(c) of the Act to disparage, criticize, or denigrate the union stops when the comments threaten employees or otherwise impinge upon § 7 rights. *J & J Snack Foods Handhelds Corp.*, 363 NLRB No. 21, slip op. 14 (2015), citing *Children's Center for Behavioral Development*, 347 NLRB 35 (2006). "[A]ny balancing of the employer rights of free speech and the rights of employees to be free from coercion, restraint, and interference must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *J & J Snack Foods*, 363 NLRB slip op. at 14, *citing NLRB v. Gissel Packing*, 395 U.S. 575, 617 (1969).

In the *J & J Snack Foods* case, the employer sent a letter to employees defending its decision to ban employees' union representative from the facility, which was filled with misrepresentations and half-truths about the union representative's conduct. It further contained statements to employees that it was their choice who they selected as their bargaining representative, that the employer could refuse to bargain with a representative who behaved offensively, and that employees should contact human resources with any questions, assuring them they would make every effort to find an answer or solution. The Board, affirming the ALJ, found that "[t]he letter was clearly aimed at "disparaging and discrediting the statutory representative in the eyes of its employee constituents, to seek to persuade the employees to exert pressure on the representative to submit to the will of the employer, and to create the impression that the employer rather than the union is the true protector of the employees' interests. *J & J Snack Foods,* 363 NLRB slip op. at 14, *citing General Electric Co.*, 150 NLRB 192, 195 (1964).

Similarly, in the instant matter, around the end of June 2018, Respondent posted a notice for employees, in both English and Spanish, responding to claims made in a notice made to employees expressing the claim, *inter alia*, that without the Union, employees would lose certain benefits. Respondent's notice went far beyond simply responding to claims in the Union's notice, and instead denigrated the Union, and encouraged employees to abandon support for the Union.

First, Respondent disparaged the Union through its characterization of the Union's statements in its notice as outlandish and false, and explained that the Union's claims that employees could lose certain benefits without a Union was "one of the most dishonest statements we can imagine." Next, Respondent encouraged employees to abandon their support for the Union by telling them not only that employees at other of Respondent's hotels have the benefits referenced in the Union's notice, but also that they have more, and mostly without union representation. The notice further refers to the Union as a divisive third party, and ends by welcoming Unit employees to come to management with concerns they may have for solutions that are satisfactory to them. Although usually arising in the context of an organizational campaign or an investigation into the effect of an employer's conduct with respect to a decertification effort, Board law is clear that it is coercive when an employer solicits employees grievances and promises to remedy them, as it effectively communicates to employees that union representation is unnecessary. *See Hospital Shared Services*, 330 NLRB 317 (1999), *citing Reliance Electric Co.*, 191 NLRB 44, 46 (1971).

In sum, Respondent's message to Unit employees was clear: employees did not need their Union and could have more without the Union, the Union was unnecessary and harmful to Unit employees' interests, and that employees did not need the Union because Respond would resolve their problems. As such, Respondent violated § 8(a)(1) of the Act.

Further, as the invitation to resolve Unit employees' problems was to the exclusion of the Union, Respondent's notice also constituted unlawful direct dealing. *See, e.g., Permanente Medical Group*, 332 NLRB 1143, 1144-45 (2000); *Southern California Gas Co.*, 316 NLRB 979, 982 (1995) (direct dealing shown

where employer communicates with represented employees for the purpose of establishing conditions or making changes regarding a mandatory subject of bargaining and does so to the exclusion of the union).

IV. CONCLUSION

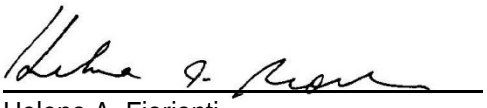
In light of the above and the record as a whole, the General Counsel respectfully submits that Respondent violated: § 8(a)(1) of the Act by restricting Union access to its facility by calling the Anchorage Police Department on the Union; § 8(a)(4) of the Act by proposing to alter the Union access proposal in retaliation for the Union filing an unfair labor practice charge.; and §§ 8(a)(1) and 8(a)(5) of the Act by engaging in surveillance by increasing the number of supervisors and/or managers who visited the cafeteria during the time the Union's representatives visited the cafeteria to interact with employees, restricting Union access to its facility by barring interns, denigrating the Union and dealing directly with employees, failing and refusing to bargain in good faith with the Union, including by failing to make counter-proposals, ceasing negotiations, refusing future bargaining and implementing its access proposal, and failing to timely provide the Union with information.

As such, the General Counsel requests that the ALJ find accordingly, issue the attached proposed Order and Notice to Employees consistent with those findings and, given the breadth of the violations in this case, that he also order that Respondent's general manager read the contents of the notice to Unit employees. *See 1621 Route 22 West Operating Co., LLC*, 364 NLRB No. 43, slip op. at 5 (2016) (because of employer's proclivity for violating the Act, and to dissipate as much as possible any lingering effect of serious and widespread unfair labor practices and enable employees to exercise their Section 7 rights free

of coercion, the remedial notice must be read aloud to respondent's employees). *See also J & J Snack Foods Handhelds, Inc*., 363 NLRB No. 21, slip op. at 1 (2015).

DATED at Seattle, Washington, this 17th day of December, 2019.

Respectfully submitted:



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PROPOSED ORDER

The Respondent, CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage, Anchorage, Alaska, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) engaging in surveillance of employees 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;

(b) unilaterally banning the Union's interns from its facility;

(c) making proposals to restrict Union access to retaliate against the Union for filing an unfair labor practice charge;

(d) failing to bargain in good faith, and unlawfully declaring impasse;

(e) making changes to the Union access policy in the Implemented Agreement without reaching agreement on a collective bargaining agreement;

(f) disparaging and denigrating the Union;

(g) dealing directly with Unit employees;

(h) interfering with Union representatives' access to its facility by calling the police; and

(i) failing to timely provide the Union with information.

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

(a) Rescind all changes made to Article IV of the Implemented Agreement on January 15, 2018;

(b) Restore all of the Union's interns' access rights that they had prior to July 27, 2017;

(c) Upon request, bargain in good faith with the Union as the Unit employees' exclusive collective bargaining representative for a collective bargaining agreement;

(d) Within 14 days after service by the Region, post at its facility in Anchorage, Alaska, copies of the attached notice marked Appendix.[1] Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet

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

site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent; and

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

APPENDIX

PROPOSED NOTICE TO EMPLOYEES
(To be printed and posted on official Board notice form)
[QR CODE]

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

UNITE HERE! Local 878 (the "Union") is the representative in dealing with us regarding wages, hours and other working conditions of our employees employed at our facility at 500 West 3rd Avenue, Anchorage, Alaska (the "Hotel"), in the following bargaining unit ("Unit"):

> All full-time and part-time banquet bartenders, banquet captains, banquet servers, banquet housemen, baristas, bellmen, bell captains, bruins bartenders, bus persons, cashiers, coat check/room check attendants, cocktail servers, concierges, cooks, dishwashers/stewards, doormen, front desk/PBX employees, hosts/hostesses, housekeeping clerks, housekeepers/room attendants, housemen, housekeeping inspectors, laundry presser/chute employees, laundry washers, maintenance employees, maintenance supervisors, night auditors, purchasing employees, restaurant servers, and room service employees.

WE WILL NOT, without first providing notice and an opportunity to bargain to the Union, change the practice of having a minimal number of supervisors and/or managers present in the cafeteria during the hours of about 10 a.m. to 11 a.m. daily when your Union representatives visit and interact with you in our cafeteria;

WE WILL NOT watch you as you interact with Union representatives in our cafeteria;

WE WILL NOT unilaterally make changes regarding Union visitation at our properties, including by the Union's interns, without first negotiating with the Union about those changes or reaching an overall good faith impasse in negotiations;

WE WILL NOT call or threaten to call the police to have Union representatives removed from the Hotel when the language of our Implemented Agreement allows for their presence;

WE WILL NOT propose to implement changes to the Union visitation language restricting the Union's rights to visit with you, because the Union filed charges against us with the National Labor Relations Board;

WE WILL NOT refuse to bargain in good faith with the Union for a collective bargaining agreement;

WE WILL NOT refuse to timely provide the Union with information that is relevant and necessary to its role as your bargaining representative;

WE WILL NOT denigrate the Union or undercut the Union's role in bargaining by telling you that you can achieve more by working with management rather than by having a Union;

WE WILL NOT bypass the Union and offer to deal with you directly concerning your terms and conditions of employment;

WE WILL, upon request, bargain in good faith with the Union as your exclusive collective bargaining Representative for a collective bargaining agreement;

WE WILL rescind the change we made unilaterally of increasing the number of supervisors and/or managers who visit our cafeteria during the time your Union representatives typically visit and interact with you;

WE WILL rescind all changes we made to the Union visitation language that we implemented on January 15, 2018;

WE WILL rescind all changes we made to Union interns' rights to what those rights were prior to July 27, 2017;

WE WILL deal exclusively with the Union concerning your terms and conditions of employment;

WE HAVE provided the Union with the information in its letter dated January 3, 2017, and WE HAVE provided the Union with the information requested on about August 3 and 22, 2017;

WE WILL, within 15 days of the Union's request, meet and bargain at reasonable times and places and in good faith with the Union as your exclusive bargaining representative with respect to your wages, hours, and other terms and conditions of employment until a full agreement or a bonafide impasse is reached.

CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage

(Respondent)

Date: _____ By: _____

(Representative) (Title)

19-CA-193656, 19-CA-193659, 19-CA-203675, 19-CA-212923, 19-CA-212950, 19-CA-218647 &19-CA-228578

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

905 2nd Ave., Ste. 2948
Seattle, WA 98174

Telephone: (206) 220-6300
Hours of Operation: 8:15 a.m. to 4:45 p.m.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the General Counsel's Brief to the Administrative Law Judge was served on the 17th day of December, 2019, on the following parties:

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