

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

UNITE HERE! LOCAL 878

CASES 19-CA-193656

19-CA-193659

19-CA-203675

19-CA-212923

19-CA-212950

19-CA-218647

19-CA-228578

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION OF MARCH 4, 2020**

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I. INTRODUCTION

Respondent, CP ANCHORAGE HOTEL 2, LLC, D/B/A HILTON ANCHORAGE (“Respondent”), hereby submits this brief in support of its exceptions to the March 4, 2020 Decision of Administrative Law Judge (“ALJ”) Andrew S. Gollin in the referenced cases.

II. STATEMENT OF THE CASE

This matter involves Section 8(a)(5) and (1) unfair labor practice charges filed against Respondent in 2018 by the UNITE HERE Local 878 (“Union”).¹ The first of the charges to which exception is taken by Respondent, 19-CA-212950, was filed on January 10, 2018, and served on January 12, 2018, alleging that until January 5, 2018, Respondent had failed to bargain in good faith for a successor labor agreement and had threatened to implement its bargaining proposal concerning union access to Respondent’s property. (ALJ 2:19-21;² GC Exs. 1(y), (z), and (ii), p. 3 ¶(h)).³ This charge was amended on January 31, 2018 (and served on February 1, 2018) to eliminate the limitation in time to January 5, 2018 and adding claims that Respondent had improperly implemented its access proposal and breached a unilateral settlement agreement. (ALJ 2:9-10; GC Exs. 1(aa), (bb) and (ii), p. 3 ¶(i)). The second charge excepted by

¹ In addition to the two charges for which exceptions are made, several other Union charges came before the ALJ. He found against the Union on several of them, and against Respondent on others. In the interests of economy in this difficult time of pandemic, Respondent has limited its exceptions and challenges to two charges as stated in the Exceptions and discussed herein. Several of the charges to which exceptions are not taken – those related to information requests (19-CA-193659 and 19-CA-212923), and another related to access denial to Union interns (19-CA-203675), are discussed in the brief to the extent the ALJ erroneously used them as a basis for finding that impasse had not been reached. The fact that Respondent has not excepted to these charges is not intended to waive its position that they are not a legitimate ground for finding that impasse did not exist.

² References to the ALJ’s decision are (ALJ page:lines).

³ Exhibits are stated as follows: General Counsel Exhibits, “GC Ex. ___”; Respondent’s Exhibits “R. Ex. ___”; Charging Party’s Exhibits, “CP Ex. ___”, and Joint Exhibits, “Jt. Ex. ___”.

Respondent is 19-CA-218647, filed on April 17, 2018, and served on April 18, 2018, alleging that Respondent had interfered with employees' Section 7 rights by contacting the Anchorage Police Department for assistance in preventing access by Union agents onto Respondent's property. (ALJ 2:21-23, GC Exs. 1(cc), (dd) and (ii), p. 3 ¶(j)).

The Regional Director, Region 19, issued and served a complaint on February 28, 2019, which was solely based on a different charge, 19-CA-225466. (GC Exs. 1(c), (d)). Respondent answered the original complaint on March 13, 2019. (GC Ex. 1(e)). The Regional Director issued and served an amended complaint on June 20, 2019, (GC Exs. 1(g), (h)), which Respondent answered on July 3, 2019. (GC Ex. 1(j)). On July 12, 2019, the Regional Director issued and served an order consolidating various other charges into the complaint, including the charges excepted by Respondent. (ALJ 2:28-29; GC Exs. 1(ii), (jj)). The Regional Director issued and served an amended consolidated complaint on July 25, 2019, (ALJ 2:29; GC Exs. 1(kk), (ll)), which Respondent answered on August 8, 2019. (ALJ 2:30; GC Ex. 1(mm)). The Regional Director issued and served a further amended consolidated complaint on August 12, 2019, (ALJ 2:30; GC Exs. 1(qq), (rr)), which Respondent answered on August 26, 2019. (ALJ 2:30; GC Ex. 1(ss)). On September 9, 2019, the Regional Director dismissed and severed 19-CA-225466 (which had been the sole basis of the original complaint) from the further amended consolidated complaint. (GC Ex. 1(tt)). The General Counsel amended the complaint again on October 30, 2019, (ALJ 2:32-37; GC Ex. 11). Respondent filed its final answer to the complaint as repeatedly amended on October 30, 2019. (ALJ 2:37-38; R. Ex. 43).

A hearing was held in Anchorage, Alaska on October 28-30, 2019, and in Seattle, Washington on November 12, 2019, before the Honorable Andrew S. Gollin. (ALJ 1). The record was made up of testimony presented through a number of witnesses and through exhibits submitted both jointly and separately by the parties. The parties filed closing briefs on December 17, 2019 and ALJ Gollin issued his decision on March 4, 2020.

III. STATEMENT OF THE ISSUES

The principal issues are:

1. Did the ALJ err by making factual determinations not supported by the record?
2. Did the ALJ err in finding that Respondent engaged in bad faith bargaining?
3. Did the ALJ err in concluding that a single issue impasse had not been reached on Respondent's access proposal?
4. Did the ALJ err in concluding that Respondent improperly implemented its access proposal?
5. Did the ALJ err in concluding Respondent improperly contacted the Anchorage police?
6. Did the ALJ err in providing a remedy that included a bargaining directive on the main contract and failed to dismiss the allegations against Respondent?

IV. STATEMENT OF FACTS

A. Introduction

The bargaining unit is comprised of Respondent's employees at its Hilton-flagged hotel in Anchorage. (ALJ 3:15-26). The bargaining parties have had an unsettled relationship since they reached an impasse in their bargaining for a successor agreement in in 2008-09. (ALJ 3:30). The bargaining unit has worked under an implemented contract since then. (ALJ 3:30-31). Shortly after implementation, the Union began economic boycott activity against Respondent which continues to date. (ALJ 4:2-5). In 2014, Respondent implemented a new health care plan after reopener negotiations again reached impasse.⁴ (ALJ 3:32-35).

⁴ The Union filed a charge claiming that Respondent had unlawfully implemented in that instance. Case No. 29-CA-127945. The December 19, 2014 Advice Memorandum in that case concluded that implementation had occurred after a lawful impasse. Respondent was not

In 2015, the Union's access to Respondent's property became an issue after Union representatives trespassed into guest room areas late at night and placed boycott-related flyers⁵ under guest room doors.⁶ (ALJ 4:21-23). As a result, Respondent sent a proposal to the Union to limit its representatives' hotel access, including moving Union meetings with employees out of the employee cafeteria to a room to be designated.⁷ (ALJ 4:27-45). After several months, Respondent agreed to table its proposal based on the Union local president's commitment that the Union would not engage in similar actions, but reserved the right to revisit the issue in the future if necessary. (ALJ 5:11-15). However, the very next summer, the Union breached that commitment when its representatives trespassed into guest room areas at Respondent's sister hotel Anchorage Marriott to distribute boycott-related materials about the Hilton Anchorage to guests. Respondent strongly objected to this latest intrusion. (ALJ 5:17-27).

allowed to ask questions about it in the instant case. (Tr. 327).

⁵ The flyers sought information from guests about room conditions, including presence of mold, and referenced Union website moldreportak.org, which at some point became a focal subject of the Union's boycott. (Tr. 336; R. Ex. 12, p. 4).

⁶ The June 2015 incident was the latest of a number of Union access abuses. Respondent responded to a Union information request that other abuses included: (1) Union announcements interrupting the employee cafeteria, which is open to all employees, (2) unauthorized air sampling and other Union representatives being present in non-public and working areas, (3) employee meetings staged by the Union with a U.S. Senator and a news crew in the cafeteria, and (4) Union rally activity (clapping) in the hotel lobby in the presence of hotel guests. (Tr. 340; R. Ex. 15, pp. 1-2).

⁷ Article IV, Section 1 of the implemented agreement stated (and still does):

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

(Jt. Ex. 4, p. 60).

In early March 2017, an incident in the cafeteria sparked another protest by Respondent. Several employees complained to management that they were being subjected to tape-recorded interviews by Union representatives as they were eating their meal in the cafeteria. (ALJ 9:2-9). Respondent then sent another proposal to the Union to modify access by moving Union meetings out of the employee cafeteria. (ALJ 8:27-40). In response, and nearly two months later, the Union sought to condition bargaining on proposals it said it would make on wages, benefits and several other proposals which it indicated would be preceded by voluminous information requests. (ALJ 9:28-35).

The Union's statement of intent to expand the bargaining was followed by a considerable slowdown; in the ten month period after the access proposal was presented, the Union allowed only a few short meetings. Moreover, no progress was made on the access issue during this time. In fact, with a single exception, the Union did not during this ten month period make the bargaining proposals it had conditioned the bargaining on, nor had it made a counteroffer to Respondent's access proposal. Instead, the Union sent innumerable, short-deadlined and largely irrelevant information requests, and it repeatedly avoided date commitments or postponed bargaining dates.⁸

As a result, the few bargaining sessions that did occur in 2017 were separated by multiples of months. Over three months passed between a very brief opening session on April 21 and partial day meetings on August 3-4. Another four months passed before the Union finally agreed to meet again on December 20, 2017. On that date, the Union finally appeared with its first written access counterproposal and the long threatened written proposals (one of which had earlier been emailed to Respondent in October). However, the Union access counterproposal did not move the parties closer. Two weeks later, on January 5, 2018, Respondent declared impasse on that single issue and informed

⁸ Respondent, on the other hand, sought to mitigate against the Union's delay efforts by responding quickly to the Union's many information demands and by repeatedly asking for bargaining dates.

the Union that it intended to implement its access proposal in ten days.

The Union repeatedly defied Respondent's effort to implement the access proposal by continuing to send its representatives into the employee cafeteria on a daily basis. When the Union's president wrote to Respondent's General Manager that the Union did not intend to adhere to the implemented policy, the General Manager sought the advice of the local police about whether Respondent could enforce its private property rights.

Respondent's January 5, 2018 letter also rejected the Union's proposals but did not declare the parties to be at impasse over them. Despite that, the Union did not test whether Respondent was refusing to bargain over them and has done nothing since then to pursue its own bargaining aims. In fact, Respondent committed in a couple of settlement agreements negotiated with the Region (that ultimately were not accepted by the Union) to resume bargaining upon request, but the Union still has never made that request. Rather, the Union elected to immediately pursue a bad faith bargaining charge. Case No. 19-CA-212950).

B. The parties' pre-2017 bargaining history.

Respondent operates the Anchorage Hilton hotel in downtown Anchorage, Alaska.⁹ (ALJ 3:15-16; Jt. Ex. 1, ¶1.1). The Union represents a bargaining unit that seasonally fluctuates to as many as 200 employees in hotel operations jobs.¹⁰ (ALJ 3:16-26; Jt. Ex. 1, ¶¶6, 7. Tr. 68).

⁹ Respondent's key management personnel have been as follows. Soham Bhattacharyya was in several positions before serving as General Manager from late January to mid-October 2017. (Tr. 666) Steve Rader, was Assistant General Manager from early January to mid-October 2017 and General Manager from mid-October 2017 until late May 2019. (Tr. 765)

¹⁰ Marvin Jones is the Union Local 878 President. Tr. 512. Daniel Esparza has been Local 878's Vice President since 2009 and responsibility for the Anchorage Hilton labor agreement. Tr. 69. Business Agent Dayra Valades works with Esparza on that contract. (*Id.*, Tr. 381-82) David Glaser, from the International office in San Francisco, the Union's chief negotiator and has been involved in its economic boycott directed at Respondent. (Tr. 230-31; 318-19)

The last negotiated agreement between the parties ran from 2005 to 2008. (ALJ 3:28-29; Jt. Ex. 1, ¶7). On April 13, 2009, after bargaining in 2008-09 resulted in an impasse, Respondent implemented its last best offer. (ALJ 3:30-31; Jt. Ex. 1 ¶¶8-10). Sometime after this, the Union began a secondary boycott against Respondent, which has continued to the present. (ALJ 4:2-5; Tr. 319).

Union hotel access issues first surfaced in mid-2015. A July 2, 2015 letter from Respondent's then General Manager Bill Tokman to the Union complained that its representatives had distributed a survey form in guest areas of the hotel during the evening of June 28, 2015. (ALJ 4:21-25; R. Ex. 12). The Union did not disclaim responsibility for this trespass activity. (Tr. 339). Several days later, Respondent sent a proposal to the Union to modify the contractual access language to among other things, change Union access to the employee cafeteria to a room to be made available by Respondent. (ALJ 4:27-42; R. Ex. 13). The parties then bargained for a time over the Respondent's access proposal. (ALJ 5:1). However, after Union president Jones assured Tokman there would be no more Union leafletting inside the hotel under his leadership, the access proposal was tabled. (ALJ 5: 11-15; R. Ex. 20; Tr. 523).

Then in early August 2016, less than a year after Jones gave his assurances, Union representatives again leafletted guest rooms. The incident occurred at the Hilton Anchorage's sister hotel, the Anchorage Marriott, but the flyers shoved under hotel room doors that night disparaged the Anchorage Hilton. (ALJ 5: 17-21; R. Ex. 16, p. 3). Respondent immediately objected in a letter from its then-counsel. (ALJ 5: 23-27; R. Ex. 17).

C. Respondent's March 2, 2017 access proposal.

Upon becoming Respondent's General Manager in January 2017, Soham Bhattacharyya renewed Respondent's attempt to amend the access language in the labor agreement. (Tr. 693-94). The proposal was drafted in February by Respondent's

counsel, but Bhattacharyya held off presenting it until hotel refinancing was finalized. (Tr. 694-95). Then, on March 2, 2017, a day after two members of the bargaining unit complained that a Union representative had insisted on tape recording them in the employee cafeteria, (ALJ 9: 2-4; Tr. 696, Jt. Ex. 1, ¶15; Jt. Ex. 9)¹¹ Respondent submitted the access proposal to the Union. Like the 2015 proposal, this included moving Union meetings out of the cafeteria. (ALJ 8: 27-40; Jt. Ex. 1, ¶14; Jt. Ex. 9).

D. The April 21, 2017 bargaining session.

The first meeting to discuss Respondent's access proposal did not occur until seven weeks later, on April 21. (ALJ 9:12). Negotiations began with a negative tone when Glaser referred to Respondent as "bottom feeders" and "bad people."¹² (ALJ 9:25-26; Tr. 346-47). Respondent's negotiator Bill Evans testified that Glaser's speech in front of two dozen hotel employees, (Tr. 233) denigrated Respondent; "it certainly wasn't reaching across the table to try to get a deal." (Tr. 554). He added that Glaser "was basically saying you guys are bad guys and you are responsible for this mess." *Id.*

The parties briefly discussed the access proposal. The Union claimed that requiring that its representatives go to a different room would be a hardship on employees; Respondent contended that Union representatives' presence in the cafeteria was disruptive. (Tr. 234-35). Otherwise, as described in Evans' April 29, 2017 email, the session "amounted to little more than a two-hour introduction" and the Union did not provide a counterproposal to the access proposal. (Jt. Ex. 11, p. 2). Evans felt the Union's strident presentation made the negotiations more difficult. (*Id.*) Towards the end of the session, the Union's negotiator Glaser stated that the Union wanted to expand the negotiations to address wages, benefits and other issues. (ALJ 9: 29-35; R. Ex. 10, p.

¹¹ Bhattacharyya's letter reiterated that the cafeteria is intended for employees' personal time; something that employees had complained was being disrupted by Union representatives.

¹² Glaser admitted he made the "bottom feeders" reference. (Tr. 237).

4).

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

Evans asked in an April 29 email if the Union would continue bargaining over the access proposal, and if so, when it could return to the table. (ALJ 9:37-39; Jt. Ex. 11, pp. 1-2). Glaser briefly responded on May 1 that the Union would continue bargaining. (ALJ 9:39-41; Jt. Ex. 11, p. 1). In a May 8 email, he clearly conditioned bargaining over the access proposal on proposals the Union intended to make, claiming that the parties no longer were at impasse. (ALJ 9:41-46; Jt. Ex. 12, pp. 2-3). He stated:

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

This is imperative in the first instance simply to enable us to bargain meaningfully about the proposed access changes.

(Ex. 12, p. 2). Glaser stated that he believed the parties would need two bargaining days to address this expanded scope which, he indicated might be “ideally sometime in mid-to-late June.” (ALJ 10:16; Jt. Ex. 12, p. 3).

In a May 11 response, Evans disagreed that the parties were not at impasse, stating he was unaware of any changes in either parties’ position on key issues. (ALJ 10:18-20; Jt. Ex. 13, p. 1). He added, though, that given specific information about any changes in the Union’s position on any material issue, he would revisit his position with Respondent. (ALJ 10:20-21; Jt. Ex. 13, pp. 1-2). Without that, Evans told Glaser, Respondent did not agree to a broader scope of negotiations but would respond to the Union’s access-related information requests and to resume the access proposal bargaining. (ALJ 10:21-23; Jt. Ex. 13, p. 2).

In a May 16 letter, Glaser completely ignored Evans' request that he identify changed positions that might affect impasse. (Jt. Ex. 16). Instead, he sent extensive and detailed information requests including a large number of areas unrelated to the access proposal. (ALJ 10:27-27; Jt. 1, ¶26; Jt. Ex. 14). These requests included:

- For each and every person in the nearly 200 member bargaining unit:
 - ◆ All contact information including all telephone numbers, email and physical addresses;
 - ◆ Dates of hire;
 - ◆ All positions held and the dates in each position;
 - ◆ Rates of pay and whether tipped or non-tipped;
 - ◆ Eligibility for the employer's health insurance policy, and if so, an active participant;
 - ◆ Status as full time, part time or seasonal, and the impact of such status on eligibility for health insurance benefits;
 - ◆ Immigration status – whether a lawful resident or working under a J-1 visa;
- The names and job classifications of non-bargaining unit members performing bargaining unit work;
- The employer's specific hiring plans for the next six months, including for non-bargaining unit personnel; and
- Each and every instance where a Union representative went to the Hilton without telling management, tried to interview employees during rush hours or in working areas, or disrupted hotel operations.

(Jt. Ex. 14, pp. 2-3).

Respondent provided an extensive response to these requests on June 5, three weeks in advance of the projected next date for bargaining. (ALJ 10:27-28; Jt. Ex. 16). Evans' transmittal letter of that date identified production of spreadsheets showing all current employees' contact information, hire dates, current and prior job classifications, current pay rate, and for health coverage, all employees who were eligible, participated and type of coverage. (Jt. Ex. 16, p. 2). The response also advised that non-bargaining

unit members were performing bargaining unit work and that Respondent intended to hire 43 temporary employees with J-1 visas, as it had in the past. (*Id.*, pp. 2-3). Finally, the letter provided a lengthy explanation in response to the Union’s demand for information about when its own representatives had accessed Respondent’s hotel over the past five years. (ALJ 10:28 – 11:8; Jt. Ex. 16, pp. 3-4).

In the June 5 transmittal email, Evans asked that Glaser let him know if he needed more information¹³ and for “some dates on which we can again meet and hopefully conclude our negotiations.” (Jt. Ex. 16, p. 1). He added “I see no legitimate reason why we cannot schedule something for the end of this month,” (*Id.*, p. 4), which was consistent with Glaser’s May 8 statement that negotiations could happen “in mid-to-late June.” (Jt. 12, p. 3).¹⁴ So, as of early June, 2017, having worked hard to comply with the Union’s May 16 information requests, Respondent had good reason to think the bargaining would resume late that month in accordance with Glaser’s statement about “ideally” meeting in late June.

The Union went radio silent at this point. Glaser had not responded to Evans’ June 5 letter (in fact not since his May 16 letter) so Evans emailed him the first thing in the morning on Monday, June 26, asking if the Union attorney was back at work from vacation and “can we set a date for our next negotiations?” (Jt. Ex. 17). The next morning, Glaser still had not responded, so Evans sent another message:

David, have you heard back from your attorney yet regarding dates for negotiations? We would like to schedule sufficient time in our next

¹³ Glaser did not respond to or even acknowledge Evans’ June 5 letter and information for over three weeks, finally, after being prodded by several additional emails from Evans, responding on June 27 with an email that complained and quibbled about details in the information provided, including the manner in which spreadsheets had been organized. (Jt. Ex. 19).

¹⁴ Evans also responded to Glaser’s statement in his May 8 letter that the access proposal might be more palatable if Respondent offered a *quid pro quo*, Jt. 12, p. 2, by stating that Respondent would consider resuming dues checkoff to address the Union’s stated needs related to relations with members. (ALJ 11:13-14; Jt. 1, ¶18; Jt. 16, p. 4).

meeting to complete the negotiations. If it takes months for the Union to schedule subsequent meetings we will need to simply lay out a sufficient block of time to fully and completely negotiate the lone issue that is on the table. Several months have passed since we made our proposal and we have yet to receive any counter-proposal or anything from the Union.

(ALJ 11:16-18;¹⁵ Jt. 1, ¶19; Jt. Ex. 18).

Glaser finally responded later in the day on June 27, attributing the delay to the Union attorney's vacation. (Jt. Ex. 19, p. 2). His letter was combative and nitpicked the manner in which the extensive information compiled by Respondent had been assembled. Moreover, it dashed any thought that the Union intended to resume bargaining any time soon, stating without explanation that the Union would not be available until August 3 or 4. (ALJ 11:18-24; Jt. Ex. 19, p. 4).¹⁶ On June 29, Evans confirmed availability then and added that Respondent was "willing to set aside as much time as you deem necessary to make a real and honest effort at resolving this issue." (ALJ 11:24-27; Jt. Ex. 20, p. 1).

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

1. The Union's San Francisco attorney Eric Myers sent requests on July 24 for detailed information about environmental conditions in the hotel. (Jt. Ex. 23).
2. That same day, July 24, Glaser requested detailed information by individual employee related to (1) all 2014-16 wages, (2) number of rooms cleaned by each housekeeper over that same time frame, including when assistance was required and where a housekeeper exceeded or fell short of the 17-room standard, and (3) all employee discipline dating back to January 1,

¹⁵ The ALJ overlooked that Evans inquired about the late June negotiation session in separate emails on June 26 and 27. (*Compare* ALJ 11:16 and Jt. Ex. 17).

¹⁶ Again, Glaser had stated in his May 16 letter that bargaining ideally could occur in late June. He provided no explanation in his June 27 letter for pushing that back another five or six weeks to early August.

2013. He demanded the information within a week, by July 31. (ALJ 11:37-38; Jt. Ex. 24).

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

Glaser knew that as he was making his extensive additional information requests shortly before the next scheduled bargaining dates, August 3-4, that other Union representatives were also sending their information requests to Respondent. (Tr. 351-52).¹⁷

Respondent quickly began compiling and producing documents and information in response to the late July wave of requests. On July 27, Evans produced the health care information requested on July 18, (Jt. Ex. 25) and a detailed letter followed up on earlier productions. (Jt. Ex. 26). He assured the Union that although Respondent was having to handle extensive requests from multiple Union offices, it was endeavoring to produce information as quickly as it could. On July 31, Evans produced extensive disciplinary records for all bargaining unit members dating from 2013.¹⁸ (Jt. 28-34).¹⁹

¹⁷ The ALJ overlooked that while Respondent was having to scramble to respond to the extensive last minute requests from Glaser on July 24 in order to keep the August 3-5 negotiation dates, it confronted requests at the same time from the Anchorage local as well as the Union's San Francisco lawyer. (Compare ALJ 11:37-38 and Jt. Exs. 23-24 and R. Exs. 27-28).

¹⁸ Glaser explained why he needed discipline records related to housekeeper room quotas, but he did not explain why the Union required the Respondent to produce all other disciplinary records for nearly five years. (Tr. 289-90). In fact, he suggested that while he had asked for these records within a week, there had not been an urgent need for them. (Tr. 357).

¹⁹ As he did elsewhere, the ALJ downplayed Respondent's efforts in trying to keep the bargaining on track. For instance, he appeared to deprecate the extensive work Respondent engaged in in getting the extensive information requested on July 24 to Glaser by July 31. Even though Jt. Exs. 25-26 and 28-34 all show production occurring in July, the ALJ concluded "Respondent later provided that requested information in August" and "some was provided prior to the August bargaining sessions and some was provided after." (ALJ 11:37-39).

F. The August 3/4 bargaining session.

The parties met for several hours on August 3 and again for part of the next day. (ALJ 12:21; Tr. 245). The first day and part of the second were spent recapping current practices at the hotel. (ALJ 12:fn. 19; Tr. 557-58; Jt. Ex. 37). Partway through the second day, the parties finally got to Respondent's access proposal, but the Union still was not prepared with a formal counteroffer. (Tr. 558-59; Jt. 370. The parties discussed Respondent's reasons for wanting to modify Union access. (ALJ 12:25-36). The Union then made several verbal offers of limitations it would accept, such as asking permission before it leafleted hotel guests or giving notice if it came to the hotel for any reason other than meeting with bargaining unit members. (ALJ 12:36-38). However, Respondent, through Evans, disputed that these were concessionary proposals, especially since the Union already was required under the current agreement to give notice whenever it came on to the property for any purpose.²⁰ (ALJ 12:38- 13:1). In fact, if they were anything, the Union's proposals really did not say much more than the Union would behave while in the hotel.

Despite representations that the Union had been hard at work on its own proposals and was "prepared to make substantial movement,"²¹ (ALJ 12:24-25) it did not make any written proposals during the August 3-4 bargaining session. (ALJ 13:6-10; Tr. 362-63). Glaser claimed in an August 9, 2017 letter that the Union had not yet done so because it allegedly needed even more information. (Jt. Ex. 39, p. 4). The pretextual nature of

²⁰ Article IV states in part:

Business representatives or other authorized representatives of the Union shall be permitted to visit the premises of the Employer at reasonable times during the working hours, *provided such representatives first make their presence known to the Employer or other appropriate management.*

(emphasis added) (Jt. Ex. 2, p. 5).

²¹ For instance, on July 24, in prefacing his additional last minute request for years of information about productivity, wages and disciplinary records, Glaser claimed "we have been hard at work . . ." (Jt. Ex. 24).

these representations is evident in that after the August session, the Union asked for little information or follow-up on prior requests.

G. August 5 – December 20: events between bargaining sessions.

On August 7, Evans emailed Glaser asking for dates for the next bargaining session and if he would send written proposals in advance. (ALJ 13:13-15; Jt. Ex. 38). The Union’s attorney Iglitzin responded on August 15 without explanation that he and Glaser would not be in Anchorage until October 24-25. (ALJ 44-46; Jt. Ex. 40). Evans replied that day that “while we would prefer an earlier meeting date, we’ll take what we can get.” (Jt. Ex. 40).

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

Also on August 17, Evans responded to Glaser’s assertion in an August 9 letter that the Union was willing to move on four issues: wages, 17-room quota, health care and successorship. (Jt. Ex. 39, p. 1). He stated that Respondent would, with respect to any such proposals, “keep an open mind regarding any proposal the Union makes and will give it honest consideration.” (Jt. Ex. 42, p. 3). Thus, while Respondent clearly stated it would bargain in good faith based on the Union’s representation that proposals would be forthcoming, he cautioned that “we have no intention of forestalling negotiations on our access proposal indefinitely while we await the promised development of future proposals.” (ALJ 13:48-14:25; Jt. 42, p. 3).

Evans’ August 17 letter also contains an important statement about the parties’ respective positions at this point on the access issue:

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

to bring any third party with them, the need for more defined and controlled access is all the more necessary.

(Jt. Ex. 42, p. 3). There is no evidence that the Union responded further to this letter.

Rather, seven more weeks passed with no activity after the Union's attorney Iglitzin announced that the Union would not resume bargaining until late October. On October 5, 2017, Evans emailed Glaser and Iglitzin seeking assurances that the Union did not need any more information to prepare proposals for that next bargaining session. He advised that Respondent wanted to start with the access proposal and he again asked that the Union send any written proposals it intended to make in advance of the meeting:

With respect to the other issues that have been mentioned by the Union, we have not received any formal proposals at this point and do not know if you are planning on making any formal proposals prior to our meeting later this month. Obviously, if you can provide any proposals you intend to make prior to our actual meeting it will enable us to be more efficient with our time. If that is not possible we certainly will consider whatever you are able to present during our actual face to face meetings.

(ALJ 14:40-47; Jt. Ex. 43). Neither Union representative responded to Evans' email.

On October 9, 2017, hotel employee and Union bargaining committee member Bill Rosario was terminated for cause.²² (ALJ 14:49-15:1). A week later, on October 16, 2017, Glaser unilaterally canceled the October 24-25 meeting. (ALJ 15:1-3; Jt. Ex. 44). In his letter that date, Glaser intimated that the Union's willingness to return to the table was conditioned on Respondent's "acceptable explanation of the hotel's conduct towards Mr. Rosario or actions promptly remedying that conduct"²³ as well as acceptance "*in*

²² The facts related to Mr. Rosario's termination are set forth in Judge Anzalone's November 14, 2019 decision in Case No. 19-CA-215741, where she recommended dismissal of the charge resulting from Mr. Rosario's termination. This decision came out shortly after the hearing in this case concluded, but it is noted in ALJ Gollins' decision. As ALJ Anzalone determined, Rosario, who worked in the hotel maintenance department, was terminated after taking pictures with his smart phone of mold he discovered under wallpaper in a guest room bathroom, which he then transmitted to the Union for use in its economic boycott activity. Rather than reporting the mold to his supervisor, he glued the wallpaper back over the mold and allowed the room to remain in use by the general public.

²³ Glaser's October 16 letter, and his follow up letter on October 20, (Jt. Ex. 46) convey a false

toto” (or a “reasonable counter-offer”) of the Union’s wage offer made for the first time in Glaser’s letter. (Jt. Ex. 44, p. 4).

In addition to inserting conditions, Glaser’s October 16 letter reveals that the Union still was unprepared for bargaining. At this point, nearly six months had passed since the April 21 session when the Union first declared its intent to weigh down the bargaining over Respondent’s access proposal by adding materials terms of the main contract to the negotiations. Nearly three months had passed since the Union had received from Respondent the great bulk of the extensive information it claimed it needed for the expanded bargaining. Despite this, Glaser stated that other than wages, the Union’s other proposals were still being developed. (Jt. Ex. 44, pp. 2-3).

Glaser also commented on Respondent’s access proposal, claiming without explanation that “the hotel’s recent decision to dictate to the Union who it may and may not designate as its agents, for the purposes of entering the hotel, and the employee cafeteria to speak to bargaining unit members, has made it impossible for us to formulate a meaningful bargaining position at this time.” (*Id.*, p. 2). He conditioned further bargaining on the access proposal upon “that decision” having “been adjudicated by the NLRB.”²⁴ (*Id.*) Evans responded immediately, expressing frustration that after seven

impression that the Union had no information about why Rosario was discharged. In the letter, Glaser admonished Evans: “you do not devote one sentence in your letter [Evans’ October 16 response, (Jt. Ex. 45)] identifying what this supposedly outrageous conduct by Mr. Rosario was. Absent such an explanation on your part, the Union can hardly be blamed for continuing to believe, as it has alleged with the NLRB, that the firing was baseless, retaliatory and unlawful.” (Jt. Ex. 46, p. 2). Actually the Union absolutely can and should be blamed as Glaser suggests. Its feigned ignorance of the reason for Rosario’s termination is totally belied by the fact that Local 878’s vice president Daniel Esparza and business agent Dayra Valades were present for and participated in management’s investigation into Rosario’s actions that precipitated the termination decision. (ALJ Decision, Case No. 19-CA-215741 at pp. 8-9). In light of this, the Union’s claim of not understanding the reason for the termination is pretextual; using that claimed lack of knowledge as a reason for cancelling the longstanding bargaining dates and conditioning further face to face bargaining is bad faith.

²⁴Glaser was referring to Respondent’s withdrawal of consent for Union interns to access the Anchorage Hilton following a July 26, 2017 incident at the Anchorage Marriott where they

months, the Union still had not made any proposals other than the wage proposal in the October 16 letter canceling negotiations. (Jt. Ex. 45, p. 1). He also stated that Respondent intended to keep the October 24-25 negotiation dates. (*Id.*)

In an October 20 response, Glaser accused Evans of being emotionally invested in the situation. (Jt. Ex. 46). Evans responded on October 23, recapping Respondent's frustration with the Union's economic boycott and bargaining approach, and he worried aloud whether the resulting chasm between the parties might easily be bridged. He concluded that while Respondent would appear the next day as agreed, it no longer would "beg the Union to negotiate." (Jt. Ex. 47, p. 9). Glaser did not respond. (Tr. 594). Another month passed before Evans wrote to Glaser on November 21, stating that Respondent would implement its access proposal on January 1 if the Union still would not return to the table. (ALJ 15:37-39; Jt. Ex. 48). Glaser finally replied on November 27, that the Union would agree to meet on December 19. (ALJ 15:39-44; Jt. 49).

H. The December 20, 2017 bargaining session.

The parties met for a third session on December 20, over four months since the second on August 3-4. The Union finally provided written proposals on the areas it first raised six months earlier on April 21: wages, health care, access, successorship and room quotas. The Union also made an access counterproposal for the first time. (ALJ 15: 46-48; Jt. 50).

After the Union explained its proposals, Respondent's team caucused and provided an initial reaction. The negotiators' post-bargaining letters largely agree that Evans advised the Union that due to the parties' adversarial relationship, he was not confident that Respondent's position on economics would change. (Jt. Ex. 51, p. 2; Jt.

trespassed into work areas to talk to the Marriott's non-union housekeepers as they were working. (Jt. Ex. 27; Tr. 257) Although the Union filed a charge, 19-CA-203675, on August 1, (GC Ex. 1(s)), just before the early August bargaining session, the Union had not refused to bargain over the access proposal on that basis until Glaser's October 16 letter.

52, p. 8). He added that Respondent needed more time to study the proposals and as this was right before the winter holiday interlude, he expected to respond further shortly into the new year. (*Id.*)

A December 30 letter from Glaser reflects that the Union proposals were not positively received at the December 20 meeting and that Evans was adamant that Respondent would not accept the Union's access counterproposal:

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

(Jt. Ex. 51, p. 3).

I. Respondent declares impasse on its access proposal.

A January 5, 2018 letter from Evans advised that Respondent believed the parties were at impasse on the access issue and that it intended to implement its March 3 access proposal on January 15, 2018. (ALJ 18:9-12; Jt. Ex. 52, p. 10). This was consistent with Evans' adamancy at the December 20 session that Respondent would not accept any provision allowing unfettered cafeteria access.

While the Union's December 20 access counterproposal purported to modify language in Article IV, it was illusory on the main issue of cafeteria access. The Union proposal included an alternative location for meeting with employees, as Respondent had proposed, but gave the Union complete discretion to continue to meet with the bargaining unit in the employee cafeteria. (Jt. Ex. 50, p. 6). As Evans testified, the Union's counterproposal was unacceptable because "[i]t didn't address what the Company viewed as the fundamental problem, and the fundamental reason for the access proposal was that the cafeteria, in the Hilton's view, was an unworkable location for the Union to meet with its employees." (Tr. 595). His January 5, 2018 letter explained that the Union's continued insistence on use of the employee cafeteria as a daily meeting place, was the main

sticking point after ten months of trying to get an agreement²⁵ and created the impasse:

We have indicated that we were willing to negotiate the times when the Union representatives could be present, the days on which they could be present, the manner in which they needed to alert the Hotel to their presence and other similar logistical issues surround access to the Hotel. We also physically showed you the room that the Hotel has set aside for the Union and invited any comments you might have about its adequacy. Because the Union has been focused entirely on keeping the access point in the cafeteria, it has not made any proposals in nearly a year regarding any of those other logistical issues. Accordingly we are unaware of any preferences the Union may have regarding hours of visits, days of visits or the manner of checking in and as a consequence we cannot provide any counter-proposals that would address any of those items. We can only assume that because the Union has not presented any counter-proposals involving access at any location other than the cafeteria, the Union does not have any such proposals involving access at any location other than the cafeteria, the Union does not have any such proposals and its sole proposal is to maintain access to the cafeteria.

Based on the ten months that we have been discussing this issue, it would appear that the parties are at impasse. The Hotel is not willing to continue allowing access to the cafeteria and the Union has made no counter-proposals that do not include maintaining such access. Accordingly, it is the Hotel's intention to implement its proposed changes to Article IV of the implemented agreement beginning January 15, 2018.

(ALJ 18:9-13; Jt. Ex. 52, p. 10).

Respondent also was not encouraged that the Union's other proposals were a reason to prolong negotiations on the stalemated access issue. For instance, the Union proposed that employees be on the Company health care plan, however this already had happened in 2014. (*Compare* Jt. 50, p. 3; Jt. 5, p. 3; and Jt. 6, p. 16). It otherwise did not move the parties closer together; Glaser admitted it was "more expensive than the current medical coverage offered to employees." (Tr. 302). Evans felt that even though the Union now agreed to the Company plan, the Union proposal was as costly as the Union

²⁵ Evans' August 17 letter advised Glaser that Respondent would not accept the Union's effort to have unfettered access rights. (Jt. Ex. 42).

plan. (Jt. Ex. 52, p. 8).

The Union's wage offer set out in Glaser's October 16 letter was supplemented in the December 20 offer with extra pay for carry-out work by banquet servers. (*Compare* Jt. Ex. 44, p. 3 and Jt. Ex. 50, pp. 1-2). It also proposed a 17-room limit for housekeepers, with a premium paid for the 16th and 17th rooms. (Jt. Ex. 50, p. 4). As Evans explained in the January 5 letter, Respondent "found it difficult to provide increased wages or benefits given the current animosity-laden relationship." (Jt. Ex. 52, p. 9).

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

Glaser did not respond to Evans January 5 letter. (Tr. 312). He claimed that the Union did not seek further bargaining after this because, in his view, Evans "declared us not to be good faith bargainers." (ALJ 18:15-17; Tr. 265).

J. After the Union refused to comply with the implemented access proposal, Respondent sought advice about its property rights from the Anchorage Police.

Respondent's General Manager Steve Rader emailed Union president Jones regarding Respondent's previously announced intention to implement its access proposal on January 15, 2018. (Jt. Ex. 53).²⁶ In accordance with the access proposal, Rader asked

²⁶ The ALJ decision does not discuss Rader's email other than, apparently, for its mistaken determination that the access proposal was implemented three days early. (ALJ 18:12-13, fn. 22). That email contains an obvious typo, from which the ALJ apparently extrapolated the erroneous notion of an early implementation. The email to the Union local officers, sent late in the evening on *Friday*, January 12, 2018 (at 10:07 p.m.) says: "As you know, *we are implementing* Article IV regarding Union access to the hotel *beginning Monday*, 1/12/18." (emphasis added) (Jt. Ex. 53). The email does not say implementation had already happened

that Jones call him to let him know when Union representatives planned to be at the hotel, allowing Rader to “confirm and make available a meeting room.” (*Id.*) He also advised that pursuant to the implemented language, the representatives were expected to sign in and were not allowed to access the cafeteria. *Id.*

The Union ignored Rader’s request, (Tr. 774) and after the implementation date, its representatives repeatedly defied the new limitations by going to the cafeteria six or so times in the first two weeks. (ALJ 18: 19-20; Tr. 777). For instance, Esparza and Valadez went to the cafeteria on January 16 and 17. (Tr. 774-75, 777). Rader asked to talk to them outside to allow privacy from the employees in the cafeteria and asked that they leave. (Tr. 775). They returned on January 22 accompanied by Jones and refused to leave when requested by Rader. (Tr. 407-08, 778-79). Rader followed up in a letter that date advising that if the Union continued “to access the hotel without permission, it will be viewed as trespass and I will have no other option but to involve law enforcement.” (ALJ 18: 21-24; Jt. Ex. 54) The Union continued to send its representatives into the cafeteria. (Tr. 779). On January 25, Jones wrote that the Union would continue to go into the cafeteria unless and until told otherwise by the NLRB. (ALJ 18:24-26; Jt. Ex. 55).

On January 31, Rader called the Anchorage police and asked if Respondent had options. (Tr. 780). Rader then met with police officers in his office and explained the situation. (Tr. 782-83).²⁷ The officers next spoke to Valades at the Union hall for 15

earlier that day of January 12 – it says implementation will begin on Monday. It also refers to “next week.” That the reference to “1/12/18” is an obvious typo can be seen, too, from the next exhibit, a January 22, 2018 letter from the same author, which begins, “As you know, we implemented our new proposal on January 15th . . . “ (Jt. Ex. 54). The Union’s January 25 response to that letter does not dispute that implementation began on January 15 or claim premature implementation. (Jt. Ex. 55). In fact, the General Counsel understood that the January 12 email announced that implementation would occur on January 15. (See GC Post-Hearing Brief at p. 26).

²⁷ The ALJ made no factual findings concerning Rader’s contact to the police department or about Respondent’s termination of its implementation effort after that contact.

minutes. (ALJ 18:31-37; Tr. 408). Rader was then informed that the police department would not act, at which point, Respondent discontinued efforts to implement the access language. (Tr. 783-84). Union representatives have gone into the cafeteria ever since. (Tr. 438, 784). Despite their daily access to employees, the Union did not inform its membership about these contacts from the police until a membership meeting nearly three months later, on April 19, 2018. (ALJ 18:39-40).

K. Unilateral settlements with Region 19

Respondent entered into a series of settlement agreements with the Region 19 Director and in the last two, committed to return to the bargaining table upon notice from the Union.²⁸ Respondent executed a comprehensive informal settlement with Region 19 on April 6, 2018 that committed Respondent to resume bargaining upon notice from the Union. (R. Ex. 31). It stated:

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, and if an understanding is reached, embody that understanding in a written agreement. Upon the Union's request, such bargaining sessions shall be held for a minimum of 16 hours per month, for at least 4 hours per bargaining session, or, in the alternative, on another schedule to which the Union agrees. There is no maximum on the amount of time per month or per bargaining session during which bargaining shall be held.

²⁸ A unilateral Board settlement agreement to resolve two early charges, which was approved by the Regional Director for Region 19 on August 15, 2017. (R. Ex. 33), was later held in abeyance pending investigation of Case 19-CA-212950, which alleged, in part, that Respondent was not complying with the terms of the settlement agreement. (ALJ 2:5-10; R. Ex. 34). Just how Respondent may not have complied with the July 2017 settlement agreement was not articulated in the oft-amended complaint, nor was it ever explained by the General Counsel or the Charging Party, nor for that matter was it commented on by the ALJ other than the mention that it was alleged in the charge. (ALJ 2:7-10).

(Jt. Ex. 31, p. 5) The settlement agreement advised Respondent to begin performance after approval and notification by the Regional Director:

PERFORMANCE - Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

(*Id.*, p. 2).²⁹

The Union's chief negotiator Glaser was aware that Respondent had agreed in the 2018 settlement agreement to return to the bargaining table upon request but had not requested that Respondent do so. (Tr. 369-70).

V. ARGUMENT

A. Introduction

The ALJ concluded that impasse did not exist on January 5, 2018 on the single issue of access, and on that basis, found that Respondent unlawfully refused to bargain over it and unlawfully implemented it. The ALJ erred in this determination.

While Respondent sought in early March 2017 to bargain over the single issue of the Union's hotel access, the Union began to assert that it intended to expand the bargaining to include wages, benefits and other issues over which the parties had been at impasse for some time. After ten months of very little meaningful bargaining as a result of delays completely attributable to the Union, the Union finally made a formal access proposal which it already had been told was unacceptable in that it would have allowed the Union to have unfettered access to the employee cafeteria. In light of all that

²⁹ The ALJ completely overlooked the 2018 settlement document, not mentioning it at all, and instead focused on a third unilateral Board settlement agreement, which Respondent executed on April 9, 2019. The ALJ noted that the third agreement "was never approved, and the record does not reflect why." (ALJ 2:27-28).

Respondent had endured to get to such a disappointing counteroffer on this issue, it clearly was within its rights to have declared an impasse and to have announced its intent to implement.

And even if they weren't at impasse over access, the Union's actions in repeatedly postponing meetings and otherwise approaching the bargaining over Respondent's proposal in an extremely dilatory manner justified its implementation. Respondent was otherwise justified contacting the Anchorage police to gain an understanding of possible enforcement options. When it was informed by the police that it really did not have any, Respondent ceased its implementation effort.

While unclear whether the ALJ ruled on this issue or not, Respondent did not violate Section 8(a)(5) after January 5, 2018 with respect to the Union's proposals because Respondent did not refuse to bargain over them. Moreover, the Union did not test whether Respondent was refusing to bargain nor did it seek further bargaining.

B. The ALJ erred in determining that a single issue impasse did not exist when Respondent implemented its access proposal.

The 2017 bargaining was initiated by Respondent for the sole purpose of reaching agreement on its access proposal. Over the next ten months, it sought repeatedly to engage the Union in bargaining over that proposal, and the few times that it succeeded in getting the Union to the table, the Union avoided meaningful negotiations or formally responding to the access proposal. Instead, the Union subjected Respondent to a heavy information request agenda that accompanied repeated promises that the Union would make wage, benefit and other material proposals aimed at breaking the longstanding impasse on the contract. In this way, the Union put off meetings for months at a time.

It is well settled that "overall impasse may be reached based on a deadlock over a single issue." Generally, a finding of single issue impasse has three requirements: (1) a good-faith impasse existed as to a particular issue; (2) the issue was of "overriding importance" in the bargaining; and (3) the impasse as to the single issue "led to a

breakdown in overall negotiations – in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.” *Atlantic Queens Bus Corp.*, 362 NLRB 604 (2015).

The facts readily show that impasse existed as to the access issue. The correspondence demonstrates that the access issue was “critical in the sense that it was of overriding importance in the bargaining.” *Atlantic Queens, supra*. It was first raised by Respondent in mid-2015 after the Union engaged in numerous access abuses. The access issue was the sole trigger for starting bargaining in March 2017. Evans repeatedly stressed to the Union that it was of high importance to Respondent. Although Respondent agreed to consider other Union proposals, it made no bones about its access objective and not wanting it held up while the Union spent many months claiming to be “hard at work” on other proposals. When the parties finally met on December 20, the Union’s formal counterproposal on the access issue quelled any thought that the Union intended to agree to limit its access to the employee cafeteria.

When it became clear then that the Union would not yield on unconditional cafeteria access, Respondent declared impasse and provided an implementation timeline. (Jt. Ex. 52, p. 10). The Union’s failure to make any movement on the access issue while purporting to push its agenda for a new contract for many months without action,³⁰ “led to a breakdown in overall negotiations.”³¹ *Atlantic Queens, supra*.

This situation is virtually indistinguishable from that in *New NGC, Inc.*, 359 NLRB 1058 (2013). There, the Employer sought to move the bargaining unit into a defined contribution pension plan from a defined benefit plan. The Union tried to stave off impasse on that issue by making a last minute concessionary proposal on health care.

³⁰ The ALJ’s observation that the Union “eagerly sought to bargain,” (ALJ 34:39) is completely contradicted by this history.

³¹ The Union’s utter failure to push for bargaining on its proposals after that is a tacit admission that the real 2017 bargaining had always been about the access proposal.

The Board held that it was insufficient and that impasse had been reached on the pension issue: “The Respondent had steadfastly held to its two proposals and made clear that it was unwilling to accept concessions on other issues in return for dropping them.” *Id.* In this case, Respondent repeatedly made it clear that the cafeteria access issue was of prime importance to it.³² When the Union finally presented its formal counterproposal, the language changes were of little consequence and failed to disguise that the Union was continuing to insist on unfettered access to the employee cafeteria. The Union’s other proposals were, as in *New NGC*, simply insufficient to stave off impasse over the single issue of importance to Respondent.

In short, Respondent did not violate Section 8(a)(5) by announcing it would implement the access language because impasse had been reached on that issue.

C. The ALJ erred in concluding that impasse was prevented by an unresolved ULP over an information request.

The ALJ concluded that impasse on the access issue was not possible because of the Union’s unfair labor practice charge that Respondent had not provided the Union with the names of employees who had complained on March 1, 2017 about being voice recorded by the Union’s representatives. (ALJ 34:4-10). The ALJ misapplied the law in this instance by failing to recognize that Respondent’s conduct away from the table was not shown to have been aimed at preventing a contract.

A finding that a bargaining party engaged in a collateral unfair labor practice does not automatically require a finding that the bargaining was conducted in bad faith. The Board has “been reluctant to find bad-faith bargaining exclusively on the basis of a party’s misconduct away from the bargaining table.” *Litton Systems, Inc.*, 300 NLRB 324, 330 (1990) *enfd* 949 F.2d 249 (8th Cir. 1991); *see also Audio Visual Services Group, Inc.*, 367 NLRB No. 103 at 10 (March 12, 2019). Rather, the evidence must

³² In August, Respondent informed the Union that it would not accept Union proposals that gave it unfettered access. (Jt. Ex. 42).

show that an employer's unlawful conduct away from the table impacted negotiations or caused the employer to have a "mindset to bargain in bad faith." *St. George Warehouse, Inc.*, 341 NLRB 904, 908 (2004).

In *St. George Warehouse*, the Board found that the employer violated Section 8(a)(5) and (1) by unilaterally moving unit work and failing to respond to information requests. Despite these findings, the Board concluded that the General Counsel had failed to show any nexus between those violations and the employer's conduct at the bargaining table. 341 NLRB at 907.

In this case, the facts show there is little if any real correlation between the Union's request for complaining employee identities and the Union's bargaining strategy. For one thing, the Union engaged in the complained of conduct on March 1 and it already knew who it had tape recorded,³³ and the General Counsel never established that knowing who had complained about being mistreated by the Union was essential information for the Union bargaining team. Moreover, that the Union really did not see this as important information for the bargaining can be seen from the fact that it did not ask who the complaining employees were until the August 4 bargaining session. (Jt. Ex. 39, p. 4). Add to that, Respondent agreed that it would produce documents related to the complaints, but objected to disclosure of the employee names out of a retaliation concern. (Jt. Ex. 42, p. 3). The Union never responded to this objection or otherwise explain why it now contended that the employee names were important to its bargaining position. Finally, the Union filed its charge in 19-CA-212923 on January 8, 2018, after Respondent's declaration of impasse on the access issue on January 5. (GC Ex. 1(u)) Prior to that, the Union gave Respondent had no indication that it had not accepted its

³³ Union president Jones confirmed at the hearing his knowledge that vice president Esparza had been observed tape recording members and that it made them uncomfortable. (Tr. 527.) Esparza admitted he had been counselled by Jones to stop tape recording members. (Tr. 224-25). In other words, the Union knew at the time that improper recording had occurred and certainly Esparza would have known the involved members, especially from the product of his recorder.

objection.

In light of these facts and the law on collateral misconduct, the ALJ clearly erred in his determination that the post-declaration charge prevented impasse on the access issue.

D. The ALJ erred in concluding that the Union had made concessions that precluded implementation.

The ALJ concluded that while the Union did not, in its most recent proposal, “completely relinquish access to the employee cafeteria,” it nonetheless “made substantial change in its position and moved the parties closer toward an agreement.” (ALJ 33:34-37). This ruling is in error. While the Union stretched the bargaining calendar as far as it could and then did all it could to avoid agreeing to Respondent’s primary objective of moving union meetings out of the employee cafeteria, it basically only promised to stop the kinds of access abuses that Respondent had objected to for several years. The Union did not propose to give up rights so much as it offered to not misbehave when it was at the hotel or in the cafeteria.

As noted, Respondent had from the outset stressed the importance of its proposal to move the Union’s employee visits from the employee cafeteria to another room. The Union’s formal proposal, finally given nearly ten months after Respondent gave its proposal on March 2, failed to meaningfully address this primary goal. Rather, it was completely illusory on the main issue of cafeteria access in that it gave the Union complete discretion to continue to meet with the bargaining unit in the employee cafeteria. (Jt. Ex. 50, p. 6). As Evans testified, the counterproposal was unacceptable because “[i]t didn’t address what the Company viewed as the fundamental problem, and the fundamental reason for the access proposal was that the cafeteria, in the Hilton’s view, was an unworkable location for the Union to meet with its employees.” (Tr. 595).

Evans’ January 5, 2018 letter explained that the Union’s continued insistence on use of the employee cafeteria as a daily meeting place, was the main sticking point after

ten months of trying to get an agreement and created the impasse:

Based on the ten months that we have been discussing this issue, it would appear that the parties are at impasse. The Hotel is not willing to continue allowing access to the cafeteria and the Union has made no counter-proposals that do not include maintaining such access. Accordingly, it is the Hotel's intention to implement its proposed changes to Article IV of the implemented agreement beginning January 15, 2018.

(ALJ 18:9-13; Jt. Ex. 52, p. 10).

The ALJ concluded that despite being unwilling to stop going into the employee cafeteria, the Union made concessions that he felt moved the parties closer together:

[T]he Union agreed to several concessions, including that representatives would sign in and out when they arrived at the hotel; they would not silence the cafeteria in order to make announcements or otherwise unnecessarily interfere with the ability of employees to socialize or enjoy their time in the cafeteria; and they would not take airborne or other samples, enter the mechanical rooms, hold events with the media or elected officials inside the hotel, hold rallies or demonstrations inside place Union surveys or flyers under guestroom doors, without first coordinating such activities with management.

(ALJ 33:27-33). These are insignificant items, and largely are things the Union had no right to have done in the first place. The Union had never been allowed to wander into unauthorized areas, to conduct air sampling or to trespass into the hotel mechanical room. (Tr. 695-96). Respondent strongly objected when the Union trespassed into guest areas and slipped flyers under doors. (ALJ 4:21-23).

The ALJ supported his conclusion the Union's access proposals were concessions by characterizing them as being "in direct response to reasons Respondent stated for why it wanted to revise Article IV." (ALJ 33:33-34). This is in error. The Union was by its December 20 access proposal not giving up rights, it was merely agreeing to refrain from abuses of the kind Respondent had described in responding to a 2015 Union information request: (1) Union announcements interrupting the employee cafeteria, (2) unauthorized air sampling and other Union representatives being present in non-public and working areas, (3)

employee meetings staged by the Union with a U.S. Senator and a news crew in the cafeteria, and (4) Union rally activity (clapping) in the hotel lobby in the presence of hotel guests. (Tr. 340; R. Ex. 15, pp. 1-2).

In short, the Union did not make concessions with its proposal, it merely proposed to behave better in the cafeteria and elsewhere. While that is laudable, it is also not a bargaining concession.

E. The ALJ erred in his determination that the Union's conduct did not justify implementation.

1. Introduction.

The ALJ correctly recognized that an employer's bargaining obligation may be excused "when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining," *citing Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enfd.* 15 F.3d 1087 (9th Cir. 1994). (ALJ 30:2-4). He erred in his determination that this standard did not apply in this instance.

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

The bargaining course between March 2, 2017, when Respondent presented its access proposal, and December 20, 2017, when the Union finally formally responded to it, divides into several time frames. Bargaining happened in a brief opener, a couple of days over three months later, and a brief meeting in December when the Union finally

made proposals. Each of these sessions was part of a distinct phase in the bargaining:

Phase 1: The first phase began with the March 2 proposal, included a brief session on April 21, and ended in early May, when the Union's chief negotiator formalized his advice given on April 21 that the Union wanted to expand the bargaining into successor negotiations and would be sending voluminous discovery requests. During this phase, the Union initially intimated that even with its information requests, it expected to get back to the table by late June.

Phase 2: The second phase runs from the Union's first set of information requests on May 16 to the parties meeting for two partial bargaining days on August 3-4. During this phase, Respondent's repeated requests to return to the table were either not responded to or were met with more requests for more information. The date for a next session was unilaterally pushed by the Union without explanation from June to August. Despite the fact that Respondent largely complied with the Union's extensive information demands, the Union was not prepared with proposals or counterproposals at the August session. As a result, little was accomplished at that session.

Phase 3: Following the August meeting Respondent continued to press for a next bargaining session. The Union claimed it was unavailable for nearly three months until late October. This resulted in several months of no activity. A week before the late October session was to have occurred, the Union unilaterally cancelled because of the discharge of a Union bargaining committee member. The Union claimed falsely that it did not know why the employee was discharged. At the same time, the Union finally sent its wage proposal and, while earlier insisting that face to face negotiations were essential, now demanded that Respondent negotiate by email. Respondent declined to bargain in that manner and informed the Union that it would implement its access proposal in January if the Union did not return to the table. The Union finally appeared on December 20, 2017 and finally presented its proposals and an access counterproposal.

2. The standard.

It is well-established that "if the union engages in conduct that prevents the parties from reaching either an agreement or a genuine impasse, the Respondent may be privileged to implement changes in working conditions that are consistent with its last offer." *Developing Labor Law*, (7th Ed. BNA 2017), p. 13-170 (citing *Serramonte Oldsmobile*, 318 NLRB 80 (1995), 86 F.3d 227 (D.C. Cir. 1996) (dilatatory tactics by

union and efforts to delay bargaining); *Paperworkers Locals 1009, 1973 & 98 (Jefferson Smurfit Corp.)*, 311 NLRB 41 (1993) (union delayed meetings, failed to address key Respondent proposals, made extensive last-minute requests for information already supplied to it); *Concrete Pipe & Products Corp.*, 305 NLRB 152 (1991), *aff'd* 983 F.2d 240 (D.C. Cir. 1993) (the Union conditioned bargaining on an improper request for the Employer's financial records thereby foreclosing a possibility of meaningful negotiations).³⁴ That the Union caused numerous delays is highly relevant to the question of Respondent's bargaining obligation.³⁵

3. The Union delays prior to the August meetings.

Fairly early in the critical chain of events, after the Union informed Respondent that it intended to expand the bargaining from Respondent's access proposal to a number of material, big-ticket items in the implemented contract. In early May, the Union conveyed the thoughts that while it would make certain information requests associated with its own bargaining goals, it believed substantive bargaining could occur in mid to late June. Respondent, in turn, while disagreeing that impasse on the main contract was broken, nonetheless complied with the information demands and reasonably believed the parties were on course for late June bargaining. This abruptly changed when the Union inexplicably and unilaterally pushed the bargaining until early August.

The ALJ summarily shrugged off the delay to August as being due to "the Union's scheduling conflicts and its outstanding requests for information." (ALJ 32:16-17). The ALJ's acceptance of the Union's excuses is not well supported by the factual record. Glaser claimed vaguely, in response to his attorney's self-serving questioning, that his

³⁴ Evidence of bad faith delay tactics include "persistently not agreeing to meet at suggested times," "canceling scheduled meetings without proposing any additional sessions," and "failing to make an economic proposal, after almost one year of bargaining." *The Developing Labor Law, supra*, p. 13-63.

³⁵ Where the Union has been dilatory or engaged in bad faith bargaining, "the Board has refused to find bad faith on the part of the dilatory employer." *Developing Labor Law, supra*, p. 13-65.

attorney “was hard to schedule.” (Tr. 282). However, in early May, while contemplating he would be submitting the extensive information requests he subsequently sent to Respondent, Glaser was encouraging bargaining “ideally sometime in mid- to-late June, or as soon thereafter as is convenient for you and the rest of the hotel’s management team.” (Jt. Ex. 12, pp. 3-4). This letter says nothing about scheduling being complicated by busy schedules. Moreover, when first asked about it at the hearing, Glaser explained that the delay into late June already factored in his and his attorney’s “busy schedule.”³⁶ (Tr. 242-43).

The ALJ’s treatment of the Union’s delays at this time overlooks, too, that after mid-May, Glaser stopped communicating with Evans for a full six weeks. On June 5, Evans’ letter transmitting large quantities of the information requested up to that point, also asked Glaser to confirm bargaining dates. Evans added, agreeing with Glaser’s prior sentiment that “I can see no legitimate reason why we cannot schedule something by the end of the month.” (Jt. Ex. 16, p. 4). Glaser did not respond to this letter and its request for bargaining dates for three weeks. It was only after a second email from Evans in late June asking again about bargaining, (Jt. Exs. 17, 18), that Glaser finally but curtly responded that he and the Union’s attorney could be in Anchorage for bargaining on August 3 or 4. (Jt. Ex. 19). This letter says nothing about whether anybody’s schedule prevented bargaining any sooner.

As noted, the ALJ also excused the Union’s delay on its information demands. The record shows that Respondent strove in good faith and with expedition to respond to the May 16 requests so that the bargaining might stay on the course contemplated by both parties up to that point. On June 5, Evans produced a high volume of information responding to the May 16 requests, (Jt. Ex. 14), and asked that Glaser let him know if he

³⁶ In his June 27 letter, Glaser claimed that his delay in responding was due to the attorney’s “extended family vacation.” (Jt. Ex. 19. P. 2). Thus, it would appear that the family vacation had occurred by this date.

had additional needs. (Jt. Ex. 16). Glaser did not respond for three weeks and when he did (in the same letter unilaterally pushing the bargaining into August), he claimed that some of the fine points of the Union requests still required responses. (Jt. Ex. 19). This letter did not inform Respondent that the Union would be sending even more information requests. Another three weeks passed before the Union did so, and when it happened, the demands were in multiples, came from multiple sources, were short-fused, and some were of questionable relevance to the Union's putative bargaining proposals. The brunt of these demands and their requested response times occurred in the last couple of weeks before the August dates.

On July 18, Glaser requested detailed cost, pricing and premium information related to Respondent's health care plan, as well as enrollment data about each bargaining unit member.³⁷ (Jt. Ex. 22). On July 24, another Union attorney sent an extensive demand seeking construction, environmental, regulatory and agency information related to Respondent's ongoing hotel remodeling project, presence of lead, asbestos, mold and other contaminants, as well as records related to pipe leaks, floods and similar events. (Jt. Ex. 23). That same day, July 24, Glaser requested five years' worth of all bargaining unit member discipline, individual wage information for three years, and all documentation for three years that showed the numbers of guest rooms cleaned each day by housekeepers. Glaser asked for the information within a week.³⁸ (Jt. Ex. 24).

Contrary to the ALJ's determination, the information sought in late July in no way excuses the considerable delay into August. The requests were made well after the bargaining had been put off for six weeks. Moreover, nothing in the record suggests that Respondent's response to any of the information requests prior to the August meetings

³⁷ Respondent answered this request on July 27. (Jt. Ex. 25).

³⁸ Respondent produced the information by July 31. (Jt. Exs. 28, 29, 30, 31, 32, 33 and 34. The parties agreed that wage information in the form of all bargaining unit member W-2s could be produced at the bargaining table. (Jt. Ex. 35).

was other than quick and reasonably thorough.

4. The Union caused lengthy delays after the August meetings.

The ALJ erred in excusing the Union's delay in resuming bargaining between August 4 and December 20. With minimal exception, nothing happened after August 4 between the parties once the Union made clear that it would not be available again until late October. While the ALJ characterized the parties as having "agreed to next meet for bargaining on October 24 and 25," (ALJ 32:32), this in reality was once again driven by the Union. Shortly after the August session, Evans requested another meeting "no later than mid-September," (Jt. Ex. 38), but the Union claimed it could not meet again until late October. (Jt. Ex. 40). To the extent there was "agreement" on this, Evans' responded that "we'll take what we can get." (*Id.*)

A week before the October session was to have happened, the Union abruptly canceled it (over Evans' pleas that they reconsider) after bargaining committee member Bill Rosario was terminated. (Jt. Exs. 44, 45). The Union did not offer other bargaining dates and, rather, simply refused to meet face to face. Abrupt cancellations without offers to resume bargaining constitutes bad faith. *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993); *Golden Eagle Spotting Co.*, 319 NLRB 64 (1995).

The reasoning behind this abrupt cancellation also constitutes bad faith. At that point, the Union claimed to have no information about why Rosario was terminated and it conditioned further bargaining purportedly on reversal of the decision or upon receipt of "an acceptable explanation of the hotel's conduct towards Mr. Rosario." (Jt. Ex. 44, p. 4). The ALJ excused the Union's refusal to bargain as "the Union's response to a perceived attack on its bargaining committee members and supporters through the discharge of Rosario." (ALJ 32:35-36). But this completely overlooks Judge Anzalone's factual finding that Local 878's vice president Daniel Esparza and business agent Dayra Valades were present for and actively participated in management's investigation into

Rosario's actions that preceded the termination decision. (ALJ Decision, Case No. 19-CA-215741, Nov. 14, 2019, at pp. 8-9). In light of the Union's active participation and front row knowledge of the process that preceded the termination, its feigned ignorance about why Rosario was terminated, and the indication from Glaser's letters that the Union allowed its members to become riled over this, is purely pretextual. Its refusal to negotiate until the termination was satisfactorily explained, when the Union already knew the reasons for it, is a textbook example of bad faith.

5. Summary

As the ALJ noted, "the Board examines the totality of a party's conduct to determine if it has met its obligation to bargain in good faith." *citing Public Service Co. of Oklahoma*, 334 NLRB 487 (2001), *enf'd* 318 F.3d 1173 (10th Cir. 2003). (ALJ 29:39-41.) Examination of the totality of the Union's conduct between May and December reveals considerable effort to avoid bargaining through repeated delays and postponements. While the Union concededly had some legitimate discovery objectives by its information requests which were not contested by Respondent, their timing in late July especially seemed more aimed at forcing yet another delay.

The situation is somewhat similar to that in *Matanuska Electric Ass'n*, 337 NLRB 680 (2002), where the employer was primarily focused on a singular issue, the subcontracting language. Over a seven month period, the Union repeatedly slowed the bargaining with incessant questioning at the table about the employer's proposal. The Board adopted the ALJ's finding that "questioning was a tactic and not a serious effort in most cases, to gather information." 337 NLRB at 682. He concluded that "the Union's bargaining tactics made reaching an agreement a virtual impossibility. I conclude that the Respondent had no reason to believe that the Union would change tactics in the foreseeable future and therefore was permitted to declare impasse and implement its last offer." *Id.* at 685.

The same is true here. After multiple instances of access violations, including on March 1, 2017, Respondent put forth a single proposal to modify that access. After ten months of delays, postponements and a handful of meetings where the Union was unprepared, Respondent was within its rights to implement that proposal.

F. As an impasse existed and the access proposal was legitimately implemented, the ALJ erred in his determination that Respondent improperly contacted the Anchorage police.

The ALJ concluded that because the access proposal should not have been implemented, Respondent violated Section 8(a)(5) by contacting the Anchorage police. (ALJ 35:28-30). In other words, according to the ALJ opinion, whether Respondent acted illegally in talking to the police rises and falls on whether a single issue impasse existed at that time. The ALJ erred in this determination because Respondent had validly implemented its access proposal and even if it had not, it acted to ascertain its rights and when it determined that the police would not provide enforcement assistance, abandoned any implementation effort.

Over a two week period beginning on January 15, the Union repeatedly refused to comply with the implemented language and informed Respondent it intended to continue to go into the cafeteria without limitation. The Union local president's January 25 letter made it clear that the Union had no intention to comply. (Jt. Ex. 55). On January 31, after receiving that missive, Respondent conferred with the Anchorage police about whether it had property enforcement options. (Tr. 780). When informed that the police department would not assist it in enforcement, Respondent discontinued its efforts to implement the new access language. (Tr. 783-84). Union representatives have continued to access the cafeteria ever since. (Tr. 438, 784).

Respondent attempted to enforce its property rights within the hotel by first seeking to bargain and, when that was unsuccessful, implement access language, and when that wasn't working, ask if local law enforcement might provide a solution.

Missing in all of this is any allegation or evidence that Respondent's employees were aware of the implementation effort at the time and especially that Respondent had conferred with the police department.³⁹ In other words, there is no evidence that Respondent sought by conferring with the police to undermine the Union and, rather, its objective was properly to seek enforcement of its property interests.

When Rader talked to the Union representatives in January 2018 in an effort to enforce implementation of the access proposal, he did so away from employees in the cafeteria. In light of this, there is no plausible argument that Respondent was trying to undermine the Union or that it sought to interfere with employees' Section 7 rights.⁴⁰ Rather, Respondent acted within its right as a commercial citizen to inquire if local law enforcement might assist when the Union repeatedly defied the new restriction on access to the employee cafeteria.

An employer may call on the police for assistance where motivated by reasonable concerns including interference with legally protected interests. In *UPMC Presbyterian Hospital*, 368 NLRB No. 2 (2019), the Board overruled its precedent that had allowed non-employee union representatives to access employers' public areas to solicit or promote union membership. Now, "absent discrimination between nonemployee union representatives and other nonemployees . . . the Respondent may decide what types of activities, if any, it will allow by nonemployees on its property." *UPMC* was followed by *Kroger Limited Partnership*, 368 NLRB No. 64 (2019), where the Board dismissed the

³⁹ Despite their daily access to employees, the Union did not inform its membership about these contacts from the police until a membership meeting nearly three months later, on April 19, 2018. (ALJ 18:39-40). This was nearly two weeks after Respondent executed a settlement document with the Region wherein it agreed it would not implement changes more restrictive of employees' rights than contained in the implemented agreement. (R. Ex. 31, p. 4).

⁴⁰ In *Tom's Ford, Inc.*, 253 NLRB 888 (1980), relied upon by the ALJ, (ALJ 35:17), the employer called the police, who escorted a union representative off of the shop floor "in the presence of employees." The facts presented here are more in line with those in *Hempstead Motor Hotel*, 270 NLRB 121, 123 (1984), where the General Counsel failed to show that that any employee overheard the employer's threat to call the police.

complaint, including charges that the employer unlawfully called the police to stop union solicitation in its parking lot. The ALJ disregarded the foregoing authority by concluding that the Union had a contractual right to access Respondent's property. (ALJ 35:21-23).

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

G. The ALJ erred if he ruled that Respondent has otherwise failed to bargain in good faith since January 5, 2018.

The General Counsel contended in the final amended complaint that:

8. Since about January 5, 2018, Respondent has failed and refused to bargain in good faith with the Union, including by failing to make counter-proposals, ceasing negotiations, refusing future bargaining and unilaterally implementing its access proposal.

(GC Ex. 11). Respondent understands that while the ALJ concluded that it violated Section 8(a)(5) and (1) when it attempted to implement its access proposal, it does not appear that he agreed with the General Counsel that it also has violated the ACT by "failing to make counter-proposals, cease negotiations, [or] refusing future bargaining."

Rather, the ALJ concluded:

5. Respondent violated Section 8(a)(5) and (1) of the Act since about January 5, 2018, when it failed and refused to bargain in good faith with the Union by prematurely declaring impasse over its revised Union access policy and unilaterally implementing that revised policy.

(ALJ 37:32-34). However, as these contentions in the final amended complaint are not addressed by the ALJ, but the ALJ has recommended that Respondent be ordered "On request, [to] bargain in good faith with the Union over wages, hours, and other terms and conditions of employment until a full agreement or good faith impasse is reached." (ALJ 39:9-10). Accordingly, Respondent believes additional comment may be necessary.

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

There simply is no plausible argument, too, that Respondent failed to bargain after January 5, 2018. The January 5, 2018 letter was specific in its announcement that the parties were at impasse on the access proposal and said nothing to that effect about the Union's proposals. Regarding those proposals, while Respondent rejected them, the letter also expressed an open mind. For instance, it stated regarding health care that Respondent would “be looking for opportunities going forward that will make such coverage more affordable” and in that event would “make a proposal to change the current plan.” (Jt. Ex. 52, p. 8). Likewise, regarding wages (including the 17-room issue), the letter stated “we are always willing to meet and negotiate in good faith the terms and conditions of Hotel employees, [but] we are not willing to change our positions in the absence of a respectful and good faith partner.” (*Id.*, p. 9). Respondent's message thus was clear that while it had tired of the Union's antics, it nonetheless was willing to continue bargaining. Certainly if the Union was in any way confused by this statement, it need only have asked for clarification. But, as Glaser admitted, the Union never followed up. Tr. 312.

Moreover, any finding of bad faith outside of the access rule implementation effort is precluded by the Union's failure to have tested Respondent's willingness to bargain prior to filing its unfair labor practice charge. The Union received Evans' letter

announcing Respondent’s intent to implement the access proposal and rejecting the Union’s proposals on Friday, January 5, 2018 in the afternoon. (Jt. Ex. 52, p. 1). The Union did not respond to Evans January 5 letter. (Tr. 312). Instead, five days later, on Wednesday, January 10, 2018, the Union filed the original charge in 19-CA-212950, alleging that Respondent had refused to bargain for a successor agreement including “failing to make counter-proposals, ceasing negotiations, [and] refusing future bargaining.” (GC Ex. 1(y)). The union has made no effort since to try to reengage Respondent in bargaining.

Presented with similar facts, the Board recently concluded “we simply cannot find on these facts that the Union had sufficiently tested the Respondent’s willingness to bargain at the time that it filed its bad-faith bargaining charge and ended bargaining.” *Audio Visual Services Group, Inc*, 367 NLRB No. 103, p. 8 (2019).

VI. CONCLUSION

For all reasons stated herein, Respondent respectfully requests dismissal of 19-CA-212950 and 19-CA-218647.

VII. REQUEST FOR ORAL ARGUMENT

Respondent respectfully requests that this matter be set for oral argument before the Board.

Dated: April 1, 2020.

/s/ Douglas S. Parker

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2020, I served a full, true and correct copy of the foregoing:

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

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