

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

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

and

UNITE HERE! LOCAL 878

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

**RESPONDENT'S REPLY IN SUPPORT OF EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

TABLE OF CONTENTS

	PAGE
A. Introduction.....	1
B. Respondent legitimately declared impasse on the single issue of access.	2
C. The information request charge did not affect bargaining and prevent impasse.....	3
D. Respondent’s decision to implement was privileged by the incessant Union delays.	5
E. The Charging Party Failed to Test Impasse.....	6
F. Respondent did not violate the Act by contacting the Anchorage Police.....	6

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bottom Line Enterprises, Inc.</i> , 302 NLRB 373 (1991) <i>enfd</i> 15 F.3d 1087 (9th Cir. 1994).....	5
<i>New NGC, Inc.</i> , 359 NLRB 1058 (2013)	2
<i>Paperworkers Locals 1009, 1973 & 98 (Jefferson Smurfit Corp.)</i> , 311 NLRB 41 (1993)	5
<i>Public Service Co. of Oklahoma</i> , 334 NLRB 487 (2001) <i>enfd</i> 318 F.3d 1173 (10th Cir. 2003).....	1
<i>St. George’s Warehouse</i> , 341 NLRB 904 (2004)	4

Respondent CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage replies to the April 15, 2020 Answering Brief of the Charging Party UNITE HERE! Local 878.

A. Introduction.

The Charging Party's Answering Brief is focused on selected individual details of the bargaining between the parties in 2017 but avoids the bigger picture that must be considered. *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001) *enf'd* 318 F.3d 1173 (10th Cir. 2003) ("In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table.")

The Answering Brief fails in its arguments that a single issue impasse had not been reached, or that it was prevented by Union concessions or an Employer unfair labor practice. The simple fact of the matter is that both parties refused to budge in their respective positions on the key issue raised in the access proposal, that being mandatory movement of Union meetings away from the employee cafeteria. Knowing full well that Respondent would not back away from this key part of its access proposal, the Union likewise maintained its intransigent position that it have sole discretion to continue to meet with employees in the cafeteria. In short, all factors support the determination that Respondent implemented its access proposal and the Administrative Judge's rulings that depend on his contrary determination should not be adopted by the Board.

But assuming *arguendo* that whether the parties were legitimately at impasse on the access issue as of January 5, 2018 when Respondent announced implementation is open to challenge, the answering Brief is silent and does not discuss Respondent's arguments on two important remaining issues: (1) Respondent's privilege to implement its access proposal in light of the Union's delays, and (2) the Union's abandonment of further bargaining on its proposals

after Respondent tried to implement on its single proposal.

B. Respondent legitimately declared impasse on the single issue of access.

The Answering Brief asserts there cannot have been a single issue impasse because it allegedly signaled a willingness to move the parties closer together. This is simply not borne out by the record. After ten months of avoiding meetings and when the few did happen, failing to make formal written proposals and counter-proposals, the Charging Party finally provided a formal proposal on December 20, 2017 that can best be described as the Union having given the Employer the sleeves of its vest. In other words, nothing. Under its proposal, the Union still sought absolute control over whether its representatives would mingle every day in the employee cafeteria. The Employer's goal in its proposal made nearly ten months earlier on March 3, 2017 sought to move the Union visits out of the cafeteria and into another location. It was made clear by the Charging Party's counter proposal finally made, that it was having nothing to do with that notion inasmuch as it retained complete discretion over where it would see the employees. And in a follow-up letter that preceded the impasse declaration, the Union left no doubt that it was dug in on its position.

The Charging Party's discourse on the law of single issue impasse ignores a recent Board decision cited in Respondent's opening brief, *New NGC, Inc.*, 359 NLRB 1058 (2013) where, as here, the Union tried to avert impasse on a single employer proposal with a late concessionary proposal on a different topic.

The Respondent had steadfastly held to its two proposals and made it clear that it was unwilling to accept concessions on other issues in return for dropping them. The Union, in turn, made it clear on September 2 that it would not accept the two proposals and that it was intent on "revers[ing] the trend" toward defined-contribution retirement plans.

Id. The record is unequivocal that Respondent likewise made it clear to the Charging Party that

it had not wavered from its goal of moving the Union's daily visits from the cafeteria to another

location. The Union acknowledged this in its final communication to Respondent, sent ten days after their final bargaining session and a week before Respondent's January 5, 2018 letter declaring impasse on the access proposal:

Regarding access, you stated that the Union's proposal would not work for you, and that the hotel was not willing to 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 about this: the hotel would not yield on this point.

* * *

When we discussed the overall situation of the parties further, you reiterated that the hotel's sole desire is to implement its new access proposal, and that at no time since the hotel first communicated that proposal (March 2, 2017) has it had any desire to negotiate a successor agreement.

Jt. Ex. 51, p. 3. This letter shows that the Union unquestionably understood that Respondent felt the parties were at impasse and intended to implement its access proposal. Yet nowhere in this statement by its chief negotiator is there any indication that the Union had any intention of ever yielding to Respondent's objective. While the chief negotiator asked Respondent to reconsider its position, he did not offer that the Union would also be willing to do so. In light of that, and in light of the long time it took to get to this point in the access bargaining, impasse existed on the access proposal and Respondent legally sought to implement it.

C. The information request charge did not affect bargaining and prevent impasse.

The Charging Party's other argument against impasse discussed in the Answering Brief, whether impasse was prevented by Respondent's failure to identify several employees who complained about the Union's practice of tape recording them in the cafeteria, is equally unavailing. The Union simply did not show that its desire to expose bargaining unit members who were unhappy with its practice had the slightest connection to either party's bargaining position on the access proposal. It is undisputed that several people had complained; the Union admitted that the business agent who had done so was counselled to stop doing it. Who those

people were matters not in light of that admission and lacks any nexus to the bargaining.

Neglected in the Answering Brief is any discussion of *St. George's Warehouse*, 341 NLRB 904 (2004), a case where the Board ruled that the General Counsel failed to establish a nexus between pending charges and bargaining sufficient to prevent impasse. Rather, “the Respondent’s conduct did not act to impede the progress of negotiations. Moreover, negotiations continued on the very subjects that the dissent claims were stymied.” *Id.* at 908. In that case, as here, there simply was no evidence that the lack of any response impacted the bargaining in the slightest. In this case, the evidence only points the other way.

Although the Union knew by March 3, 2017 that employees had gone to the Employer and expressed their unhappiness over being tape recorded by the Union, Jt. Ex. 10, the Union did not request the identities of the complaining employees for five months. Not until August 4, 2017, the second day of the August bargaining session, did the Union request that information. Jt. Ex. 39, p. 4. Even then, the Union never explained why the information was important to its ability to bargain, never claimed it could not respond to Respondent’s access proposal without knowing complaining employees’ names, never replied to Respondent’s written objections to the request, Jt. Ex. 42, p. 3, and other than a reference to it in an August 9, 2017 communication, Jt. Ex. 39, p. 4, never followed up on the request. Only after Respondent announced its intent to implement its access proposal in its January 5, 2018 letter did the Charging Party’s information request, come back to the surface, in this instance in 19-CA-212923 filed on January 8, 2018.

In short, contrary to the Charging Party’s contention that it had been deprived of information “relevant to the core issues separating the parties,” Answering Brief, p. 6, the evidence shows only that the identities of the complaining employees had zero nexus to the access proposal bargaining.

D. Respondent’s decision to implement was privileged by the incessant Union delays.

The Answering Brief ignores Respondent’s argument that it was privileged to implement its access proposal after nearly a year of Union foot dragging.¹ The Charging Party undeniably avoided meaningful bargaining over Respondent’s access proposal by repeatedly littering the bargaining pathway with delays and by repeatedly trying to create even more delays with multiple volleys of information requests. This was true pretty much from the onset of the access bargaining in the spring of 2017 and it persisted into the winter that followed. In response to Respondent’s “diligent and earnest efforts to engage in bargaining,” *Bottom Line Enterprises, Inc.*, 302 NLRB 373, 374 (1991) *enft* 15 F.3d 1087 (9th Cir. 1994), the Union repeatedly set meetings weeks and months in the future with minimal to no explanation for why it could not meet sooner.² It pressured the Employer into innumerable information requests in May into July, thereby delaying the only sessions of substance from June to August. Thereafter the Union was to appear only one more time and only because Respondent began threatening to implement its access proposal if the Union continued to refuse to show up for bargaining. These facts alone justify the access proposal impasse declaration.

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¹ 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 employer may be privileged to implement changes in working conditions that are consistent with its last offer.” Developing Labor Law, Chapter 13 (citing *Serramonte Oldsmobile*, 318 NLRB 80 (1995), *enft* granted in part and denied in part, 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 employer proposals, made extensive last-minute requests for information already supplied to it).

² “Conduct that causes extended and unwarranted intervals between meetings can show bad faith.” *Id.* (citing *Teamsters Local 122 (Busch)*, 334 NLRB 1190 (union action in limiting and delaying bargaining session prompted Board to award negotiating expenses to the employer)).

E. The Charging Party Failed to Test Impasse.

The Answering Brief is also silent on Respondent's argument that the Union walked away after receiving Respondent's January 5, 2018 letter.³ The Union did nothing to test impasse on the access proposal and it never sought to renew bargaining on its own proposals since then. Had the Union really wanted to bargain over and obtain a successor contract, it simply should not have taken months and months to pull its handful of proposals together. That it then has gone radio silent ever since after receiving Respondent's letter challenging those proposals is further evidence that the Union's real agenda in 2017 was to delay and avoid getting to an agreement on Respondent's access proposal.

F. Respondent did not violate the Act by contacting the Anchorage Police.

The Answering Brief correctly understands that among Respondent's arguments is that the legality of an effort to enforce the implemented access proposal by consulting with the local police is dependent in considerable part on whether impasse had been reached at the time of the implementation effort. That was the basis of the ALJ's determination that Respondent's contact with the police was improper. (ALJ 35:28-30). If, as Respondent strongly contends by its exceptions, the ALJ was in error in his determination that impasse did not exist as of January 5, 2018, then the Board must consider that the contact with the police was proper.

A couple of other points made in the Answering Brief bear mention. For one, the Charging Party has shrilly mischaracterized the intent and action of Respondent's General Manager in contacting the police. He did not, as the Charging Party claims, "contact[] them to report a trespass by the Union and ask[] them to remove Union representatives from the

³ The Charging Party's Answering Brief also says nothing in response to Respondent's Exceptions to the ALJ's unclear ruling on the General Counsel's claim that Respondent has failed since January 5, 2018 to bargain in good faith. For the reasons stated in Respondent's Brief in Support of Exceptions, dismissal of that claim should be confirmed.

property.” Answering Brief, p. 7. The only witness with direct knowledge of that contact, Respondent’s General Manager Steve Rader, testified that he called the police department “and asked what the options were for people coming into the hotel that weren’t following – weren’t wanted in that manner by management.” Tr. 780:14-17; see also Tr. 782:18 – 783:2. His testimony otherwise did not support the Charging Party’s accusation.

The Charging Party also claims without legal authority that it matters little if members of the bargaining unit did not know about Mr. Rader’s contact if, in fact, the parties were not at impasse when he did so. Presumably by this, the Charging Party agrees that the sole focus should be on whether the parties were at impasse.

Dated this 29th day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th 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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