UNITED STATES COURT OF APPEALS
FOR THE 9TH CIRCUIT

UNITE HERE! LOCAL 878, AFL-CIO, Petitioner, v. THE NATIONAL LABOR RELATIONS BOARD, Respondent.	No. **PETITION FOR REVIEW**

Petitioner UNITE HERE! Local 878, AFL-CIO ("Local 878") hereby petitions the court for review of the order of the National Labor Relations Board (NLRB), entered on February 10, 2021, in consolidated cases 19-CA-193656, *et seq.*, attached hereto. Specifically, Local 878 asserts that it is aggrieved by, and asks this court to review, the following portions of the order:

1. The NLRB's dismissal of Local 878's allegation that CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage, violated Section 8(a)(1) of the National Labor Relations Act by creating a circumstance where employees reasonably would believe that management was in the cafeteria for the purpose of surveilling their protected activity, by

permitting management to abruptly begin hosting meetings in the cafeteria during the time Union representatives usually met with employees.

2. The NLRB's dismissal of Local 878's allegation that CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage, violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act when the Hotel unilaterally changed its past practice of allowing the Union to meet in the employee cafeteria each day without employer interference.

Respectfully submitted this 22nd day of February, 2021.

s/Dmitri Iglitzin
Dmitri Iglitzin, WSBA# 17673
s/Kelly Ann Skahan
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2021, I electronically filed the foregoing Petition for Review with the court, and caused a true and correct copy of the same to be placed in the UPS Overnight mail addressed to:

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Attachment

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage and UNITE HERE! Local 878, AFL–CIO. Cases 19–CA–193656, 19–CA–193659, 19–CA–203675, 19–CA–212923, 19–CA–212950, 19–CA–218647 and 19–CA–228578

February 10, 2021

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND RING

On March 4, 2020, Administrative Law Judge Andrew S. Gollin issued the attached decision. The Charging Party and the Respondent each filed exceptions, a supporting brief, and an answering brief, and the Respondent filed a reply brief. The General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions as further discussed below and to adopt the recommended Order as modified and set forth in full below.[3]

This case involves allegations that the Respondent violated Section 8(a)(5) and (1) of the Act while the parties were bargaining for a collective-bargaining agreement to succeed one that expired on August 31, 2008. These negotiations began in March 2017, when the Respondent proposed modifying the union access provision in the expired collective-bargaining agreement.[4] The judge found that the Respondent was obligated to bargain over its access proposal as part of the negotiations for a successor collective-bargaining agreement as a whole, and there are no exceptions to that finding. The judge further found that during the course of the negotiations, the Respondent violated Section 8(a)(5) and (1) by unilaterally banning the Union's interns from the hotel, failing to timely provide the Union with requested information, and declaring a single-issue impasse and unilaterally implementing its access proposal at a time when the parties had not reached a valid impasse in negotiations for a collective-bargaining agreement as a whole.[5] In addition, the judge found that by prematurely declaring impasse and unilaterally implementing its access proposal, the Respondent generally failed and refused to bargain in good faith with the Union for a successor collective-bargaining agreement.

We affirm the judge's findings and conclusions. However, as discussed below, in affirming his finding that the Respondent failed and refused to bargain in good faith, we

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, cross-exceptions, and briefs adequately present the issues and positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(4) of the Act by proposing to modify the access provision in the parties' expired collective-bargaining agreement in retaliation for the Union filing an unfair labor practice charge. There are also no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to timely provide the Union with the information requested in its letter dated January 3, 2017, regarding the schedules, timecards, and payroll records of certain unit employees (bussers).

Although the Respondent excepted to the judge's finding that it violated Sec. 8(a)(5) and (1) by bypassing the Union and engaging in direct dealing by soliciting employees' grievances and impliedly promising to remedy them, the Respondent did not present any argument in support of these exceptions. Therefore, in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations, we disregard these bare exceptions. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006). Chairman McFerran agrees with the judge's findings that the Respondent unlawfully bypassed the Union and engaged in direct dealing.

The judge also found that the Respondent violated Sec. 8(a)(5) and (1) by calling the police to report trespass by the Union's representatives when they failed to abide by the Respondent's unilaterally implemented access proposal. We adopt this finding for the reasons stated by the judge.

[3] We have amended the judge's conclusions of law consistent with our findings herein, and we have modified the judge's recommended Order to conform to the violations found and the Board's standard remedial language, and in accordance with our decisions in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020), and *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall substitute a new notice to conform to the Order as modified.

[4] In 2009, the parties bargained to impasse in negotiations for a successor collective-bargaining agreement, and the Respondent implemented portions of its final pre-impasse offer (the Implemented Agreement). In 2014, the parties again bargained to impasse in reopener negotiations, and the Respondent implemented its proposal to replace the Union's health and welfare plan with its own health care plan. Since 2014, the parties have operated under the terms of the expired collective-bargaining agreement, as modified by the Implemented Agreement and the Respondent's health care plan. The access provision in the expired collective-bargaining agreement, "Article IV Union Representative Visits," was unchanged during the 2009 and 2014 negotiations.

[5] The judge erroneously stated that the Respondent implemented its access proposal on January 12, 2018, rather than January 15, as the parties had stipulated. We correct this error, which does not affect the disposition of this case.

do so based on the totality of the Respondent's conduct, both at and away from the bargaining table.

Discussion

Section 8(d) of the Act defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." The Supreme Court has observed that the statutory duty to "meet . . . and confer in good faith" is not fulfilled by "purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485 (1960). Thus, the parties are "bound to deal with each other in a serious attempt to resolve differences and reach a common ground." Id. at 486.

"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." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001) (internal citations omitted), enfd. 318 F.3d 1173 (10th Cir. 2003). "From the context of an employer's total conduct, it must be decided whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." Id. (citing *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984)).

Applying these principles here, we find that the totality of the Respondent's conduct demonstrates that it was bargaining without a sincere desire to resolve differences and reach common ground. Starting with the Respondent's conduct at the bargaining table, the judge found, and we agree for the reasons he states, that the Respondent violated Section 8(a)(5) and (1) by declaring a single-issue impasse over its access proposal and unilaterally implementing its access proposal at a time when the parties had not reached a valid impasse in negotiations for a collective-bargaining agreement as a whole.[6] By this conduct, the Respondent foreclosed the possibility of productive bargaining. The Respondent's premature declaration of impasse suspended the negotiations and halted the parties' progress toward agreement. See *Richfield Hospitality, Inc.*, 369 NLRB No. 111, slip op. at 3 (2020) ("Precisely because impasse temporarily suspends the duty to bargain, a premature declaration of impasse is often an indicium of bad-faith bargaining."); *Grosvenor Resort*, 336 NLRB 613, 615 (2001), enfd. 52 Fed. Appx. 485 (11th Cir. 2002). Further, the Respondent's unilateral implementation of its access proposal moved the baseline for negotiations, took a significant bargaining chip off the table, and impaired the Union's ability to make *quid pro quo* concessions. This action all but ensured that no meaningful bargaining could follow.

We also find that the Respondent's conduct away from the bargaining table demonstrated an intent to frustrate agreement on a new collective-bargaining contract. On July 27, 2017, 1 week before the parties' second bargaining session, the Respondent announced that effective immediately, the Union's interns would no longer be permitted in the hotel. The judge found that the access provision in the expired collective-bargaining agreement granted union interns access to the hotel as "other authorized representatives of the Union," and that by barring union interns from the hotel without providing the Union with notice and an opportunity to bargain, the Respondent violated Section 8(a)(5) and (1).[7] Again, access was the central point of contention in the negotiations, and by unilaterally changing the status quo regarding that issue, the Respondent moved the baseline for negotiations and

[6] As noted above, the judge found that the Respondent was required to bargain over its access proposal as part of the negotiations for an agreement as a whole, and the Respondent has not excepted to that finding. The Board requires that when parties are engaged in negotiations for a collective-bargaining agreement, the employer must refrain from implementing any changes in terms and conditions of employment until an agreement or overall impasse has been reached on bargaining for the agreement as a whole, absent certain exceptions not applicable here. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994); *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995). However, the Board has held that "overall impasse may be reached based on a deadlock over a single issue." *Atlantic Queens Bus Corp.*, 362 NLRB 604, 604 (2015) (citing *CalMat Co.*, 331 NLRB 1084, 1097 (2000)). "The party asserting a single-issue impasse has the burden to prove three elements: (1) that a good-faith impasse existed as to a particular issue; (2) that the issue was critical in the sense that it was of 'overriding importance' in the bargaining; and (3) that the impasse as to the single issue 'led to a breakdown in overall negotiations' . . . ." Id. (quoting *CalMat*, supra, 331 NLRB at 1097). Here, for the reasons explained by the judge, the Respondent failed to prove that an impasse existed as to the Respondent's access proposal, and even assuming that impasse was reached on that issue, the Respondent failed to show that it led to a breakdown in the overall negotiations. We therefore find it unnecessary to determine whether the Respondent proved that the issue was of overriding importance in the bargaining.

[7] Although the Respondent filed exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally barring the Union's interns from the hotel, the Respondent did not present any argument in support of the exceptions. Therefore, in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations, we disregard these bare exceptions. See *Holsum de Puerto Rico, Inc.*, supra, 344 NLRB at 694 fn. 1. In any event, we agree with the judge's finding that the Respondent unlawfully barred the Union's interns from the hotel.

undermined the Union's bargaining position.[8] The Respondent's unilateral change also created friction at the bargaining table, as this unlawful action prompted the Union to file an unfair labor practice charge days before the parties' second bargaining session.

The Respondent also impeded bargaining by failing to timely provide the Union with requested relevant information. In early March 2017, the Respondent notified the Union that "a number of employees" had complained that union representatives were "interfering with their personal time in the cafeteria" by "sit[ting] at their tables in the cafeteria" without asking and making them provide voice-recorded statements. The Respondent later advised the Union that its access proposal was motivated in part by the employees' complaints. The Union requested the names of the employees who had complained so that it could verify the Respondent's claims and address its concerns. The Respondent refused to provide the names, citing the risk of retaliation.[9] The Union nevertheless prepared a counterproposal on access in which it moved significantly from its prior position and towards the Respondent's, and it presented its counterproposal at the parties' final bargaining session on December 20, 2017. Based on complaints the Respondent had made about the actions of union representatives when visiting the hotel, this counterproposal restricted union representatives' conduct in a number of ways, but it retained the right of its representatives to meet with hotel employees in nonworking areas, including the cafeteria. By letter dated January 5, 2018, the Respondent stated that the Union's counterproposal was not acceptable because, in part, the Respondent's access proposal "was sparked by an employee complaint about the conduct of Union representatives in the cafeteria," and therefore it would be best "if a specifically designated meeting room was made available for the Union representatives to meet with those employees who wish to meet with the Union representatives and not involve others who may simply want to enjoy their break time." The Respondent then declared that the parties were at impasse because the Union had not made any counterproposal that did not involve maintaining access to the cafeteria.

The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to timely provide the Union with the names of the complaining employees, and there are no exceptions to that finding.[10] The judge further found, and we agree, that the information was critical to the Union's ability to formulate counterproposals, and by failing to timely provide the information, the Respondent undermined the Union's ability to engage in meaningful bargaining.[11] The Respondent's failure to provide in a timely manner information that was relevant and necessary to the collective-bargaining process is further compelling evidence that the Respondent was not bargaining in good faith. See *Richfield Hospitality*, supra, 369 NLRB No. 111, slip op. at 3; *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 8 (2018); *Regency Service Carts, Inc.*, 345 NLRB 671, 675 (2005); *Bryant & Stratton Business Institute*, supra, 321 NLRB at 1044.

In sum, we conclude that the Respondent's unlawful conduct both at and away from the bargaining table demonstrates that it did not negotiate with a sincere desire to settle differences and arrive at an agreement.[12] Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in

[8] The Board has long considered unilateral changes that occur during the course of collective bargaining and that undermine the union's bargaining position to evidence the employer's intent not to bargain in good faith. See *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996) (collecting cases), enfd. 140 F.3d 169 (2d Cir. 1998). As the Supreme Court has recognized, unilateral changes made during contract negotiations "must of necessity obstruct bargaining, contrary to the congressional policy." *NLRB v. Katz*, 369 U.S. 736, 747 (1962). "[I]t is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).

[9] Thereafter, by letter dated August 22, 2017, the Union renewed its request and explained its need for the information as follows:

> In light of the hotel's position that these complaints contribute to the reasons why it wishes to modify the status quo policies regarding the access of union representatives to the hotel, we need to know . . . the name of each bargaining unit member who allegedly communicated these complaints . . . . We can only meaningfully address the employer's underlying concerns regarding access if we have a reasonable opportunity to do our own investigation regarding the substance of the complaints that allegedly gave rise to those concerns.

[10] The Respondent provided the Union with the requested names on March 20, 2019.

[11] We also agree with the judge that the Respondent's failure to timely provide the information precluded a valid impasse. "It is well-settled that 'a finding of valid impasse is precluded where the employer has failed to supply requested information relevant to the core issues separating the parties.'" *Arbah Hotel Corp. d/b/a Meadowlands View Hotel*, 368 NLRB No. 119, slip op. at 21 (2019) (quoting *Colorado Symphony Association*, 366 NLRB No. 122, slip op. at 34 (2018)), enfd. 798 Fed. Appx. 669 (D.C. Cir. 2020). The Respondent demonstrated, by its own statements, that the information requested by the Union was relevant to the core issue separating the parties, the Union's access to the hotel.

[12] We emphasize that our finding is not based on the Respondent's firmness in insisting on its access proposal. It is well established that "adamant" insistence on a negotiating position "is not of itself a refusal to bargain in good faith." *Atlanta Hilton & Tower*, supra, 271 NLRB at 1603. However, the Respondent did not merely adhere to its access proposal; it refused to submit proposals or counterproposals on any other topic. Further, despite its self-serving assurances that it was "always willing to meet and negotiate in good faith," the Respondent made clear that it did not approach the collective-bargaining process with an open mind, rejecting all the Union's proposals without making any counterproposals, and baselessly informing the Union that it was "not willing to change [its] considered positions in the absence of a respectful and good faith partner," even though the Union had not failed to bargain in good faith.

good faith with the Union for a successor collective-bargaining agreement.[13]

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 5 and renumber the remaining Conclusions of Law accordingly.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by prematurely declaring impasse over its revised Union access policy and then implementing that revised policy unilaterally on January 15, 2018.

6. The Respondent has violated Section 8(a)(5) and (1) since about January 5, 2018, when it failed and refused to bargain in good faith with the Union.

ORDER

The National Labor Relations Board orders that the Respondent, CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage, Anchorage, Alaska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with UNITE HERE! Local 878 (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Unilaterally changing the terms and conditions of employment of its unit employees, including the Union's right to access the hotel, without first notifying the Union and giving it an opportunity to bargain.

(c) Failing and refusing to timely furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(d) Unilaterally changing the terms and conditions of employment of its unit employees by implementing bargaining proposals at a time when it has not reached a valid overall impasse in negotiations with the Union for a collective-bargaining agreement.

(e) Seeking to enforce its unilateral changes to the union access policy by calling the police and reporting that the Union's officials are trespassing if they continue to access the hotel in accordance with past practice and the terms of the expired collective-bargaining agreement.

(f) Bypassing the Union and dealing directly with unit employees with regard to wages, hours, or other terms and conditions of employment.

(g) Soliciting grievances from employees and impliedly promising to remedy them in order to discourage employees from supporting the Union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and part-time banquet bartenders, banquet captains, banquet servers, banquet housemen, baristas, bellmen, bell captains, bruins bartenders, bus persons, cashiers, coat check/room check attendants, cocktail servers, concierges, cooks, dishwashers/stewards, doormen, front desk/PBX employees, hosts/hostesses, housekeeping clerks, housekeepers/room attendants, housemen, housekeeping inspectors, laundry presser/chute employees, laundry washers, maintenance employees, maintenance supervisors, night auditors, purchasing employees, restaurant servers, and room service employees employed at the facility located at 500 West 3rd Avenue, Anchorage, Alaska.

(b) Rescind the unilateral changes made to the Union's access rights that were implemented on July 27, 2017, and January 15, 2018.

(c) Post at its facility in Anchorage, Alaska, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are

[13] To remedy this violation, the judge recommended an affirmative bargaining order. Although the Respondent excepts to the judge's finding that it failed and refused to bargain in good faith in violation of Sec. 8(a)(5), it does not argue that the judge's recommended affirmative bargaining order is an improper remedy for this violation. It is therefore unnecessary for the Board to provide a specific justification for that remedy. See *Arbah Hotel*, supra, 368 NLRB No. 119, slip op. at 1 fn. 2 (collecting cases).

[14] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of the paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 3, 2017.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 10, 2021

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

John F. Ring Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with UNITE HERE! Local 878 (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT unilaterally change the terms and conditions of employment of our unit employees, including the Union's right to access the hotel, without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT fail and refuse to timely furnish the Union with requested information that is relevant and necessary to its performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT unilaterally change the terms and conditions of employment of our unit employees by implementing bargaining proposals at a time when we have not reached a valid overall impasse in negotiations with the Union for a collective-bargaining agreement.

WE WILL NOT seek to enforce our unilateral changes to the union access policy by calling the police and reporting that the Union's officials are trespassing if they continue to access the hotel in accordance with past practice and the terms of our expired collective-bargaining agreement with the Union.

WE WILL NOT bypass the Union and deal directly with you regarding your terms and conditions of employment.

WE WILL NOT solicit grievances from you and impliedly promise to remedy them in order to discourage you from supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and part-time banquet bartenders, banquet captains, banquet servers, banquet housemen, baristas, bellmen, bell captains, bruins bartenders, bus persons, cashiers, coat check/room check attendants, cocktail servers, concierges, cooks, dishwashers/stewards, doormen, front desk/PBX employees, hosts/hostesses, housekeeping clerks, housekeepers/room attendants, housemen, housekeeping inspectors, laundry presser/chute employees, laundry washers, maintenance employees, maintenance supervisors, night auditors, purchasing employees, restaurant servers, and room service employees employed at the facility located at 500 West 3rd Avenue, Anchorage, Alaska.

WE WILL rescind the unilateral changes to the Union's rights to access the hotel that we implemented on June 27, 2017, and January 15, 2018.

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

The Board's decision can be found at www.nlrb.gov/case/19-CA-193656 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Helena Fiorianti, *Esq.,* for the General Counsel.
Douglas S. Parker and *Renea I. Saade*, *Esqs.,* for the Respondent.
Dmitri Iglitzin, *Esq*., for the Charging Party.

DECISION

INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. These seven consolidated cases were tried on October 28-30, 2019, in Anchorage, Alaska, and on November 12, 2019, in Seattle, Washington.

UNITE HERE! Local 878 ("Charging Party" or "Union") represents a unit of employees working for CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage ("Respondent" or "Hotel"). The parties' last collective-bargaining agreement, which expired in 2008, gave Union representatives the right to access hotel property, including the employee cafeteria in the basement of the hotel. For years, the representatives regularly visited the cafeteria as their primary method of communicating with unit members. In early March 2017, Respondent proposed to revise the contractual language to limit where and when the representatives could access the hotel, specifically eliminating access to the cafeteria. The Union sought to bargain over the proposed changes to access as part of an overall, new collective-bargaining agreement. The General Counsel alleges, inter alia, that Respondent failed and refused to bargain in good faith, including by failing to timely provide the Union with requested information, refusing to make proposals and counterproposals, prematurely declaring impasse, unilaterally implementing its revised access policy, and then contacting the local police to assist in enforcing the implemented policy. As explained below, I find merit to certain of the alleged violations.

STATEMENT OF THE CASE

On February 22, 2017, the Union filed the charge in Case 19–CA–19365, which it amended on May 25, 2017, alleging that Respondent unilaterally changed employees' working conditions and engaged in surveillance when it increased the number of managers and supervisors in the cafeteria when Union representatives were there interacting with employees. Also on February 22, 2017, the Union filed the charge in Case 19–CA–193659, which it amended on April 20, 2017, alleging, in part, that Respondent failed or refused to provide the Union with requested information regarding bussers who worked in one of the hotel's restaurants. On July 31, 2017, Respondent entered into a unilateral Board settlement agreement to resolve these two cases, which the Regional Director for Region 19 approved on August 15, 2017. (R. Exh. 33). The Union later appealed the settlement, and that appeal was denied in January 2018. On February 1, 2018, the Region informed Respondent it was holding the settlement in abeyance pending investigation of a subsequent charge (Case 19–CA–212950) alleging, in part, that Respondent was not complying with the terms of the settlement agreement. (R. Exh. 34).

On August 1, 2017, the Union filed the charge in Case 19–CA–203675, alleging that Respondent failed to bargain before unilaterally barring Union interns from accessing the hotel. On January 8, 2018, the Union filed the charge in Case 19–CA–212923, which it amended on March 2, 2018, alleging that Respondent failed and refused to provide the Union with requested employee complaints to management that the Union was forcing them to consent to having their statements voice recorded.

On March 2, 2017, Respondent proposed to revise the Union access policy. It implemented that revised policy in January 2018. On January 10, 2018, the Union filed the charge in Case 19–CA–212950, which it amended on January 31, 2018, alleging that Respondent failed to bargain in good faith with the Union, including failing to make counterproposals, ceasing negotiations, refusing future bargaining, and unilaterally implementing its revised access policy. On April 17, 2018, the Union filed the charge in Case 19–CA–218647, alleging that Respondent called the Anchorage Police Department to report that Union officials were trespassing when they did not comply with the revised access policy. On October 3, 2018, the Union filed the charge in Case 19–CA–228578, alleging that Respondent bypassed the Union and dealt directly with unit employees about their terms and conditions of employment, as well as denigrated the Union, by posting a notice on the bulletin board near the employee timeclock.

On April 9, 2019, Respondent executed a unilateral Board settlement agreement to resolve these charges. That settlement was never approved, and the record does not reflect why. On July 12, the Regional Director issued an amended consolidated complaint.[2] The complaint was further amended on July 25, and again on August 12. Respondent filed its answer on August 8,

[1] Abbreviations herein are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibits; "G.C. Exh." for General Counsel's Exhibits; "R. Exh." for Respondent's Exhibits; and "C.P. Exh." For Charging Party's Exhibits. Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record.

[2] On July 11, 2018, an employee filed a decertification petition in Case 19–RD–223516. In accordance with *Saint Gobain Abrasives, Inc*., 342 NLRB 434 (2004), the Regional Director consolidated the petition

and its amended answer on August 24.[3]

On October 30, 2019, at the conclusion of her case in chief, Counsel for General Counsel amended the complaint to modify and add certain allegations. The added allegation was that Respondent proposed to revise the Union access policy on March 2, 2017, in retaliation for the Union filing its initial charge in Case 19–CA–19365 over the increased presence of management in the employee cafeteria. The resulting document following these amendments will hereinafter be referred to as the final amended consolidated complaint. (G.C. Exh. 11). On October 30, 2019, Respondent filed its final amended answer, denying the alleged violations and raising various affirmative defenses. (R. Exh. 43).

At the hearing, all parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. The parties filed post-hearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the post-hearing briefs and my observations of the credibility of the witnesses, I make the following findings of fact, conclusions of law, and recommended order.

Findings of Fact[4]

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. COLLECTIVE-BARGAINING RELATIONSHIP AND BARGAINING HISTORY

In about December 2005, Respondent took over operation of the Hilton Anchorage, which is a 606-room hotel in the downtown area. At the time, Respondent recognized the Union as the exclusive collective-bargaining representative of the following bargaining unit:

> All full-time and part-time banquet bartenders, banquet captains, banquet servers, banquet housemen, baristas, bellmen, bell captains, bruins bartenders, bus persons, cashiers, coat check/room check attendants, cocktail servers, concierges, cooks, dishwashers/stewards, doormen, front desk/PBX employees, hosts/hostesses, housekeeping clerks, housekeepers/room attendants, housemen, housekeeping inspectors, laundry presser/chute employees, laundry washers, maintenance employees, maintenance supervisors, night auditors, purchasing employees, restaurant servers, and room service employees employed at the facility located at 500 West 3rd Avenue, Anchorage, Alaska.

Respondent also adopted the existing collective-bargaining agreement, dated September 1, 2004, to August 31, 2008. (Jt. Exh. 2). In 2008 and 2009, the parties met to bargain over a successor agreement. On March 30, 2009, Respondent declared an impasse in those negotiations, and, on April 13, 2009, it implemented portions of its March 11, 2009 contract proposal ("Implemented Agreement"). In 2013, Respondent proposed to end its participation in the Union's health fund and move the unit employees to the company's health plan. The parties met for negotiations, and those negotiations ended in February 2014, after Respondent declared impasse and announced implementation of its proposed health care change on April 1, 2014.[5]

In recent years, the Union and its International Union have attempted to exert economic pressure on Respondent to return to the bargaining table to negotiate a successor collective-bargaining agreement by holding rallies or protests involving politicians and the media, circulating flyers or surveys suggesting the presence of asbestos, mold, and air quality issues inside the hotel, and urging a consumer boycott.

III. UNION ACCESS

Article IV of the collective-bargaining agreement, which remained unchanged in the Implemented Agreement, is entitled "Union Representative Visits." It states that:

> 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

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with the amended consolidated complaint to allow the parties the opportunity to present evidence over whether the allegations at issue bore a causal relationship to the filing of the petition warranting its dismissal. Following the hearing, the parties moved to sever and remand the petition to the Regional Director, which I granted by separate order.

[3] The Union also filed a charge in Case 19–CA–225466, and allegations from that charge were included in the amended consolidated complaint. The Regional Director later severed that case and dismissed those allegations.

[4] The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was incredible and unworthy of belief. In assessing credibility, I primarily relied upon witness demeanor. I also considered the context of the witness's testimony, the quality of the witness's recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), rev'd. on other grounds 340 U.S. 474 (1951)).

[5] In February 2014, Respondent's then-attorney sent the Union a letter stating the parties were at impasse on four key issues: wages, health care, the 17-room cleaning requirement, and successors/assigns language. On wages, the Union proposed wage increases to match the rates paid at the nearby Captain Cook hotel. With respect to health care, the Union proposed that the Hotel remain in the Union health and benefit trust fund and pay the increased employer contributions. On the 17-room cleaning requirement, which dealt with the number of rooms housekeeping staff were expected to clean during their shifts, the Union sought to progressively reduce the requirement from 17 down to 15. The letter does not explain the Union's position on successors/assigns language. (Jt. Exh. 5, pg. 1–2).

> such representatives first make their presence known to the Employer 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. Exh. 2, pg. 5).[6]

In late June 2015, volunteers with the International Union walked through the hotel and placed surveys under guestroom doors asking guests to rate any air quality, water leakage, or mold issues in their rooms. On July 2, 2015, Respondent's then-General Manager Bill Tokman sent the Union a letter demanding the solicitation immediately cease and not recur, stating that such distribution far exceeded the access granted under Article IV. (R. Exh. 12).

On July 10, 2015, Respondent sent the Union a letter proposing to change the language in Article IV to the following:

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

(R. Exh. 13).

The Union demanded to bargain and the parties met for bargaining in late summer 2015. The Union submitted an information request asking Respondent to provide its rationale for revising the access policy. Respondent answered that it wanted to restrict where and when Union representatives could be on the property because of instances in which Union representatives or others were: accessing the property to speak to on-duty employees, including in the mechanical room of the hotel, which posed a safety concern; walking around the property to take airborne or other samples without permission; distributing surveys under guestroom doors without permission; going into the employee cafeteria to make announcements and disrupting employees eating their meals; and holding public rallies, protests, or demonstrations inside the hotel. (R. Exh. 15).

Union President Marvin Jones later spoke with Tokman about the revised policy, specifically the distribution of flyers or surveys under guestroom doors. Jones promised that, under his leadership, the Union would not engage in such conduct in the future. After further communication, Tokman notified Jones on December 23, 2015, that, for the time being, the Hotel was willing to forego the proposed change, but it reserved the right to revisit the issue in the future if it deemed appropriate. (R. Exh. 20).

Eight months later, the Union distributed flyers under guestroom doors at the nearby Anchorage Marriott Hotel. Both the Hilton Anchorage and the Anchorage Marriott are owned by Columbia Sussex. The flyer noted the common ownership and stated the Hilton had lead, asbestos, and mold issues, and that "Columbia Sussex must assure that asbestos and lead remain safely contained whenever it performs work to address leaky pipes, mold, and other maintenance issues at the Anchorage." (R. Exh. 16).

Respondent's then-attorney sent the Union a letter objecting to the distribution of the flyers, noting that Respondent previously objected to the Union placing flyers under the guestroom doors at the Hilton, and the Union assured Respondent it would not happen again. The letter further stated that Columbia Sussex does not allow third parties, including the Union, unfettered access to its hotels. The letter concluded by threatening legal action if there was any further unauthorized entry onto its property. (R. Exh. 17).

IV. ALLEGED UNFAIR LABOR PRACTICES

A. Information Request Regarding Bussers

In January 2017, Soham Bhattacharyya replaced Tokman as the Hotel's General Manager. Bhattacharyya had been the interim General Manager for a few months prior. On January 3-4, 2017, Union President Jones sent Bhattacharyya four letters alleging Respondent was violating the parties' agreement. In one letter, Jones claimed Respondent was reducing the hours of bussers working in the hotel's Berry Patch restaurant and having the wait staff assume their duties. Jones demanded these practices cease immediately and that bussers be made whole for lost wages and benefits from November 1 to the present. Jones also requested copies of the bussers' schedules, timecards, and payroll records for that time period. (Jt. Exh. 7).

At the time, Bhattacharyya was on an extended family vacation. On January 20, he responded to the letters Jones had sent. Regarding the bussers, Bhattacharyya wrote: "It is not our practice to have restaurant servers buss their own tables. We have 2 bussers on payroll for the AM shift. They are scheduled consistently; however, there have been a few occasions when the morning bussers have called in for the shifts, on the day of. On such short notice in the morning, it has been hard to find a replacement for those few occasions." Bhattacharyya also noted that the restaurant's name had changed from Berry Patch to Hooper Bay in around 2006. (Jt. Exh. 8). Bhattacharyya did not include or provide any of the requested information. He testified he had intended to provide the information but simply forgot because he had several letters to respond to from the Union. (Tr. 703; 709).

[6] This is interchangeably referred to as the visitation policy or the access policy.

The Union did not follow-up on its information request regarding the bussers.

On February 22, 2017, the Union filed its original charge in Case 19–CA–193659, alleging Respondent unilaterally reduced the bussers' hours without bargaining with the Union. On April 20, the Union amended that charge to allege Respondent also failed to provide the Union with the requested information. On June 2, Respondent's attorney provided Jones with the requested schedules, timecards, and payroll records, stating that Bhattacharyya had forgotten the Union had requested them. (Jt. Exh. 15).

B. Managers and Supervisors in the Employee Cafeteria/Breakroom

As noted, the hotel has an employee cafeteria in its basement. It consists of a larger room and an adjacent smaller room. The larger room has 7 table booths, and the smaller room has 6. The food, beverages, and buffet line are in the larger room. Both rooms have televisions for employees to watch. The Union maintains a bulletin board outside the entrance to the large room.

Respondent serves complementary meals for all employees between 10 a.m. and 1 p.m., and again at 5 p.m. Employees may go to the cafeteria at any time to take their half-hour lunch break. The only requirement is that they must remain in the cafeteria while they eat.

Union Representative Danny Esparza has visited the employee cafeteria Monday through Friday, between 10 a.m. and 11 a.m., since at least 2010. These visits served as the Union's primary method of communicating with members. In 2017, Union Organizer Dayra Valades began accompanying Esparza on his visits to the hotel. Upon entering the hotel, they typically would head to the basement, examine the Union bulletin board, check the quality of the food being served, and then walk around the cafeteria to talk with employees. Most employees took their lunch break when the representatives were in the cafeteria.

Respondent's supervisors and managers also used the employee cafeteria for meals and breaks. According to Esparza, prior to February 2017, he saw Human Resources Manager Daniel McClintock and, on occasion, Director of Housekeeping Ivan Tellis in the cafeteria.[7] Esparza saw McClintock daily, and he usually would be in the cafeteria eating his lunch for 10-20 minutes. (Tr. 75-76). Esparza saw Tellis in the cafeteria between once a week to once a month, and he usually would stay for 10-15 minutes. (Tr. 77-78). Esparza initially could not recall seeing any other managers in the cafeteria prior to February 2017, but he later acknowledged that he saw Director of Maintenance Bob Best there a couple of times. (Tr. 153).[8]

Other managers testified they also ate lunch in the cafeteria prior to and after February 2017. Director of Rooms Brandon Donnelly testified he usually arrived between 10 and 10:30 a.m. and would stay for about 20 minutes. Steven Rader, the Assistant General Manager who later became the General Manager, testified that he arrived at around 10 a.m., but he did not testify about how long he usually stayed. General Manager Bhattacharyya testified he regularly ate lunch in the cafeteria, but the time of day varied based on his schedule. He usually remained for 10–25 minutes.[9]

On February 7, 2017, Esparza and Valades went to the employee cafeteria at around 10 a.m. They saw Bhattacharyya, Rader, Tellis, McClintock, Donnelly, Best, and Director of Food and Beverage Leonard Esquivel holding a "stand-up meeting" in the middle of the large room in the cafeteria.[10] This was the first time Esparza or Valades saw management hold a stand-up meeting in the cafeteria. Bhattacharyya invited Esparza to join the meeting, and Esparza declined. Esparza and Valades then went into the smaller room and spoke briefly with some laundry workers sitting in there.

The following day, Esparza and Valades returned to the employee cafeteria at 10 a.m., and they noticed the same managers holding another meeting in the middle of the large room. When Esparza asked Bhattacharyya why he was in the cafeteria, Bhattacharyya responded they were there to discuss guest survey results and to recognize the performance of certain employees. Esparza testified Bhattacharyya held another meeting with managers in the cafeteria on February 21, 2017, at around 10 a.m., but Esparza did not provide any details regarding the contents of that meeting.

Esparza testified that in the weeks and months that followed,

[7] The General Counsel alleges McClintock is a statutory supervisor and agent. The General Counsel has not articulated how McClintock's status is material to my decision. Regardless, I find the General Counsel has failed to prove either. See *Oakwood Healthcare*, 348 NLRB 686, 694 (2006) (burden regarding supervisory status); and *Pan-Oston Co*., 336 NLRB 305, 306 (2001) (burden regarding agency status). The proffered evidence was limited primarily to McClintock's job title(s) and position descriptions. That evidence alone is insufficient. What matters is the evidence about the actual authority the individual possesses and the actual work he/she performs. See *Loyalhanna Health Care Assoc*., 352 NLRB 863, 864 (2008). The evidence the General Counsel presented regarding McClintock's authority and work was cursory and insufficient to meet the burden(s).

[8] Esparza genuinely struggled to independently recall and differentiate which managers and supervisors came to the cafeteria prior to February 2017. He explained the reason was that his focus was more on the members he was speaking to, and less on who else was there. He usually only noticed if he saw someone unfamiliar to him. (Tr. 165-166). Overall, I found his testimony on this topic to be vague, uncertain, and generally unreliable.

[9] I credit that Bhattacharyya, Rader, and Donnelly regularly ate in the employee cafeteria when the Union representatives were present, before and after February 2017, as they each had a clear, confident, and detailed recollection of those events and a better understanding about their mealtime habits.

[10] Respondent holds morning "stand-up" meetings with department heads Monday through Friday to recap events from the prior day and discuss the plan for the upcoming day. These meetings began at around 10 a.m. in the General Manager's office and lasted about 25-30 minutes. In January 2017, when Bhattacharyya took over as General Manager, he moved the meeting to 9:30 a.m. to free up managers to help with checkouts and in "turning over" the hotel for incoming guests. He also rotated the location of the meetings from his office to various places throughout the hotel. He testified he did this to break up the monotony and to go to areas where the managers could recognize staff members for their good performance. Bhattacharyya also held employee appreciation events at other locations in the hotel, including in the ballroom and in the upstairs restaurant.

there were between 3 to 6 members of management in the cafeteria each time he and Valades were there, and those managers typically stayed for 30 minutes or more.[11] According to Esparza, these members of management usually sat and ate lunch with one another or alone, and some would sit and try to talk to employees. Except as stated below, Esparza provided no other details about the conduct or statements of the managers or supervisors he saw. Valades corroborated that there was an increase in the number of managers and supervisors in the cafeteria starting in early February, but she offered few additional details.[12]

Bhattacharyya, Rader, and Donnelly confirmed they continued to come to the cafeteria after February 2017, and they usually would eat alone or with another member of management. They greeted employees they saw but seldom engaged them in conversation. The same is true when they saw Esparza and Valades. They denied watching or listening to the representatives' conversations with employees. Bhattacharyya and Donnelly testified it was difficult to hear much of anything being said in the cafeteria between 10 a.m. and 11 a.m., because of the noise from the televisions and all the different conversations that were occurring, many of which were not in English.

Esparza testified that on around May 9, when he was in the large room of the employee cafeteria, he saw Bhattacharyya talking with a unit employee. Esparza could not hear what was being said or discussed. On May 11, when Esparza arrived in the large room of the cafeteria, he saw Bhattacharyya and some other managers, including Daniel McClintock, there. Esparza later went into the small room to talk with employees, and he noticed McClintock enter the room with a plate of food. Esparza did not testify as to what, if anything, McClintock said or did, or where he was, while in the small room.

On about May 30, Esparza and Valades went into the employee cafeteria and spoke with J-1 visa employees about an upcoming Union rally.[13] Esparza noticed that Bhattacharyya was behind him after he spoke with the employees, and Bhattacharyya asked if he could come to the Union rally, too. Esparza responded that Bhattacharyya could come if he wanted. Esparza then proceeded to walk into the small room, where he saw three J-1 visa employees eating pizza they had brought from home. Esparza introduced himself, handed out flyers for the rally, and he invited them to attend. After he spoke with the employees about the rally, Esparza heard Bhattacharyya behind him, asking the employees if he could have some of their pizza, telling them he didn't care if Esparza made fun of him (for eating their pizza). Bhattacharyya did not testify about these events.

C. Proposal to (Again) Revise Union Access Policy

On February 22, 2017, the Union filed its charge in Case 19-CA-193656, claiming Respondent unilaterally changed employees' working conditions by holding management meetings in the cafeteria at times when the Union representatives were interacting with unit members, and those meetings interfered with, restrained, or coerced employees in the exercise of their Section 7 rights. Eight days later, on March 2, 2017, Bhattacharyya sent Marvin Jones and Esparza a letter proposing to modify the language in Article IV, effective March 17, to the following:

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

(Jt. Exh. 9).[14]

The following day, Bhattacharyya sent the Union a letter stating that on March 1, 2017, a number of employees complained to management that Jones and Esparza were interfering with their personal time in the cafeteria and making them provide voice-recorded statements as part of a Union investigation.[15] Bhattacharyya noted in his letter that the cafeteria is a place where employees can spend personal time as they please, without being badgered, stating the employees work hard and a half-

[11] With certain exceptions, Esparza could not independently recall what managers or supervisors he saw in the cafeteria after February 2017. Additionally, his testimony regarding February and March differed from his prior (and more contemporaneous) sworn statements or testimony. Pages from Esparza's notebook were introduced into evidence to help refresh or supplement his recollection. (R. Exh. 7). The notes are sparse and generally only reflect the name or title of the supervisors or managers he saw and the date. According to his notes, he saw managers and supervisors in the cafeteria on February 21, March 13, May 9-11, 15-20, 24-25, and 30, June 5 and 13-14, and July 25-26, 2017. The names of Bhattacharyya, Rader, Tellis, Donnelly, and/or McClintock appeared most frequently. Esparza, however, testified his notes were not exhaustive, and that he saw multiple managers in the cafeteria daily.

[12] Pages from Valades's notebook were also introduced into evidence. (C.P. Exh.1). Like Esparza, her notes are limited, only reflecting the name of the supervisors or managers and date she saw them in the cafeteria. Her notes reflect she saw members of management on June 7-9, 13-16, 21 and 25-28, 2017. The discrepancies between her notes and Esparza's notes over names and dates, which were unexplained, call into question their overall accuracy.

[13] The J-1 visa is a temporary, nonimmigrant student visa that allows foreign post-secondary students to study and work in the US through an approved, government-sponsored exchange program. See www.uscis.gov/working-united-states/students-and-exchange-visitors/exchange-visitors.

[14] Bhattacharyya testified that after he took over as General Manager, he determined there needed to be greater formality and consistency with how, when, and where the Union representatives accessed the hotel. He consulted with Respondent's attorney in late January, and he began drafting proposed revisions in early to mid-February 2017. Bhattacharyya testified he waited until early March to present the proposal to the Union because in January and February, Respondent was attempting to secure refinancing, and he was concerned the Union would try to interfere with that process if it knew the Hotel wanted to revise the access policy.

[15] Bhattacharyya later communicated with Union President Marvin Jones about the complaints, and Jones advised Esparza he was to no longer voice record statements from employees. (Tr. 233-234).

hour lunch break is all they get to relax, eat, and chat with their colleagues, and some employees complained to management that the Union representatives would come and sit at their tables without asking the employees if it is alright to join them. (Jt. Exh. 10).

The Union later informed Respondent it wanted to bargain over the proposed changes to Article IV. The parties first met for bargaining on April 21, 2017, and each side had a bargaining committee. International Union representative David Glaser was the Union's spokesperson, and Respondent's then-attorney Bill Evans was its spokesperson. Evans began by explaining the proposed change was in response to complaints by employees regarding the Union representatives' behavior while at the hotel, the Union's recent unfair labor practice charge that management was engaging in unlawful surveillance in the cafeteria, and the desire to have more formality over the times and places the Union could be present to meet with unit employees. (R. Exh. 10). As for this second point, Evans noted the Respondent believed its proposal was a reasonable way to address the concerns the Union raised in its charge about managers being present in the cafeteria when the Union representatives were there. He added that employees obviously want the Union, but not all of them. The Union, through Glaser, voiced opposition to the change, stating it restricted the Union's ability to talk to its members and worsened the parties' already-strained bargaining relationship. The parties then discussed the language of the proposal and how it would be interpreted and applied. At some point during the session, Glaser discussed that employees had not received a wage increase for several years. He also referred to the Hotel as "bad people" or "bottom feeders" because of how it treated its employees. (Tr. 236).

Following a caucus, Glaser stated the Union wanted to have further negotiations about the Union access proposal. He also stated that "[b]ecause of the severity of [the access] proposal, [the Union] will want to expand negotiations." Glaser pointed out that the parties have been working under an expired contract for eight years, the Union health insurance had been gone for 3 years, wages had not increased, the use of J-1 visa employees had exploded, and there were issues with mold, lead, and asbestos in the last few years. He added that if the Hotel proposed substantial wage increases and health insurance, along with changes to Union access, then the situation would be different. He concluded the letter by stating the Union would have more questions and would be making a "voluminous" information request. (R. Exh. 10).

On April 29, 2017, Evans emailed Glaser about whether the Union wanted to schedule another bargaining session regarding the revised access proposal, noting the Hotel made its proposal on March 2 and, to date, the Union had not submitted any proposed changes or counterproposal. On May 1, 2017, Glaser emailed Evans that he was in the process of preparing a response, but that, in short, the Union wanted to continue bargaining. (Jt. Exh. 11). On May 8, 2017, Glaser wrote Evans a lengthy letter stating that the Union wanted to continue negotiations over the access policy, and that the Union would have additional questions and it would provide those questions as soon as it could. (Jt. Exh. 12). Glaser went on to state that it had become clear to the Union that these negotiations would need to deal not only with the changes to Article IV, but also with the entire range of unresolved issues preventing the Union and the Hotel from reaching a new collective-bargaining agreement. He stated:

> . . . there is a much better chance of the parties reaching an agreement as to the proposed new rules if there is a quid pro quo at the bargaining table, i.e., a concession by Columbia Sussex regarding some other issue in dispute. As you know, that is how win-win deals get done; when there is only one issue on the table, it tends to be much more of a zero-sum game, where one party can only win if the other loses, and negotiations that can have only that outcome are much, much harder to resolve through mutual agreement.

Glaser further stated that even beyond the importance of reopening full negotiations to meaningfully deal with the new access policy, it has become apparent that such negotiations are necessary before any changes can be implemented because it can no longer be asserted that the parties are at impasse in their negotiations over a new agreement. He cited several factors for how the impasse had been broken, including: the passage of time (8 years) since the Hotel declared impasse, the change in economic circumstances in both the Hotel's revenue and profitability and changes in the cost of living for employees, and the need for new rules and policies relating to workplace health and safety, particularly the exposure to mold, asbestos, and lead paint. Glaser requested that the parties schedule two consecutive days in June for bargaining.[16]

On May 11, Evans responded to Glaser's letter and disputed that the parties were no longer at impasse. (Jt. Exh. 13). He stated that both parties have continued to maintain their positions and he was unaware of any changes that broke the parties' impasse. If there was a change in the Union's position(s), Glaser should make him aware and he would evaluate the change(s) with his client. Evans concluded that the Hotel stood ready to continue negotiations over access, but it would not broaden the negotiations to include additional issues. He believed a half day would be enough to complete negotiations.

On May 16, Glaser submitted a request for information related to wages, medical coverage, housekeeper workload, and other matters, including specific situations in which a Union representative caused any type of disruption or interference with Hotel operations. (Jt. Exh. 14).[17] On June 5, Evans responded by

[16] Glaser testified he proposed bargaining sessions in mid-to-late June because the Union intended to request information from Respondent on wages, healthcare, and other matters to allow the Union to prepare its bargaining proposals, and because the Union's attorney, Dimitri Iglitzin, was unavailable until June because of his travel and vacation commitments. (Tr. 235-242). The sessions were later scheduled for early August.

[17] On numerous occasions beginning on May 16, 2017, and continuing into July 2017, the Union requested information from Respondent which included particularized job history information about each employee in the bargaining unit, all wages paid over a three-year period, all employee discipline for four years, employees' immigration status, room cleaning documentation including room cleaning averages over a three year period, health plan participation by each employee, and information related to repairs Respondent's hotel building. Beginning on June 5, 2017,

providing the Union with a portion of the requested information. On the instances of disruption or interference by Union representatives, Evans wrote:

> As we discussed at some length during our one and only negotiation session, there have been a number of episodes that the Hotel is aware of in which the presence of Union officials in the Hotel has resulted in disruption. These include in June 2015 the Union placing flyers under guest doors asking guests to evaluate the condition of the rooms based on visible mold sightings, visible water leaks and air quality issues. Although somewhat different in nature, in August 2016 the Union placed flyers under the guest room doors at the Marriott claiming that the Hilton had mold, asbestos and lead problems. In March 2017 there was the incident when employees complained to management about a Union representative trying to voice record them in the cafeteria and complaining that Union representatives sit at their tables without being invited to do so. Earlier this year, Mr. Bhattacharyya observed Union representative Danny Esparza going into the second floor banquet space without permission (previous GM Bill Tokman reported seeing Mr. Esparza in the mechanics rooms also without permission). There have also been incidents during which Union representatives have stopped by the bell desk and coffee shop to have quick chats with employees and thus distracting them from their duties. In addition, Union representatives have brought other people into the cafeteria, individuals wholly unknown to Hotel management (e.g. a housekeeper from Santa Monica, earlier this year). Former GM Tokman also reports the Union bringing in a local politician and news crews into the cafeteria without notice or permission.

(Jt. Exh. 16).

Evans also reiterated that it did not appear the parties' positions had changed regarding wages or the other matters since they reached impasse. He stated, however, that as a showing of good faith, Respondent was willing to consider opening bargaining on the issue of dues check-off. (Jt. Exh. 16).

On June 27, 2017, Evans emailed Glaser asking if the Union had heard back from its attorney regarding dates for negotiations, adding the Hotel wanted to schedule enough time in the parties' next meeting to complete those negotiations. (Jt. Exh. 18). That day, Glaser wrote back to Evans raising issues with the information the Hotel provided in response to the Union's requests, including any witness statements regarding the alleged instances in which Union representatives were observed causing disruption or interference at the hotel. (Jt. Exh. 19). Glaser also disputed Evans' statements that there had been no changes in the parties' positions and denied there was dispute over dues check-off. Glaser reiterated the parties should set aside two days to bargain toward a successor agreement, and he offered to begin bargaining on August 3 or 4, 2017. (Jt. Exh. 19). On June 29, Evans wrote Glaser stating that although the Hotel did not believe it was necessary to set aside two days to negotiate over the Union access policy, it was willing to set aside as much time as the Union deemed necessary to make a real and honest effort at resolving that issue, and it was willing to meet on August 3 and 4. On the issue of dues check-off, Evans pointed out he proposed bargaining over the topic because it was his understanding that it had been eliminated (by omission) from the Implemented Agreement. (Jt. Exh. 20).

On July 24, 2017, Glaser emailed Evans that the Union remained convinced there was a meaningful possibility the parties would be able to reach a successor agreement. Glaser stated that according to a February 2014 letter from the Hotel's then-attorney, the key points of impasse were: (1) the number of rooms to be cleaned by room attendants, (2) wages, (3) health care, and (4) successor and assigns language. Glaser commented there was substantial room for change regarding the Union's past positions on those items, and there was no reason to doubt the Hotel's position would be amenable to modification as well. To that end, Glaser requested additional information on each of these topics to prepare for bargaining. (Jt. Exh. 24). Respondent later provided the Union with that requested information in August. (Jt. Exhs. 25, 26, and 28-35). Some was provided prior to the August bargaining sessions and some was provided after.

D. Barring Union Interns from the Hotel

The International Union has a summer internship program called Organizing Beyond Barriers where it educates college-aged individuals about the labor movement and UNITE HERE!. In the summer of 2017, Glaser and the Union wanted interns from this program to start coming to Respondent's hotel. Glaser testified the reason was because there were many J1-visa employees working at the hotel, and he believed they would benefit from having "people their own age talk to them about the Union." (Tr. 257).

At some point in the summer of 2017, Danny Esparza called Bhattacharyya asking if he could bring four to six interns with him during their visits to the employee cafeteria. Bhattacharyya declined that request because of the limited amount of space in the cafeteria and the total number of people the Union was seeking to bring. Marvin Jones then called Bhattacharyya, asking him to reconsider his decision regarding the interns. Bhattacharyya agreed he would allow two interns to accompany either Jones or Esparza, but not more. Jones thanked him and that was the end of the conversation. (Tr. 710).

On around July 26, the Union sent individuals to go into the Anchorage Marriott Hotel to speak with its unrepresented housekeeping employees about their working conditions. Management at that hotel took photos of the individuals and contacted the Anchorage Police Department. The Marriott's General Manager later shared the photos with Bhattacharyya, who recognized certain of the individuals as the interns the Union representatives brought with them when they came to the Hilton.

On July 27, Bill Evans emailed Jones regarding the incident, stating that individuals were trespassing at the Marriot, and some of those individuals were subsequently identified as "interns" for the Union. Evans wrote that "[i]n light of this activity, the management of the Hilton Anchorage is, effective immediately, formally withdrawing its previously granted permission that

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Respondent provided documentation in response to these information requests. Respondent continued to provide responsive documentation in the weeks that followed. (Jt. Exh. 1, pg. 5). The production lasted into August 2017.

allowed interns to be present in the Hotel."[18] Evans stated the interns were no longer welcome on Hotel property and the Union should take the necessary steps to ensure they did not accompany Jones or Esparza when visiting. (Jt. Exh. 27).

E. Bargaining, Request for Information about Employee Complaints, Declaration of Impasse, and Implementation of Revised Union Access Policy

Respondent and the Union next met for bargaining on August 3 and 4, 2017.[19] The Union, through its attorney, Dimitri Iglitzin, stated the five major issues for negotiations appeared to be: wages, health care, the number of rooms to be cleaned by room attendants (also referred to as the 17-room requirement), successor/assigns language, and Union access. He added the Union was "prepared to make substantial movement." (G.C. Exh. 5). The Union offered to begin by discussing the Union access proposal. According to the Union's bargaining notes, Respondent provided the 10 following reasons for wanting to revise the Union access policy: (1) managers were inhibited from going into the cafeteria (because of the Union's unfair labor practice charge); (2) non-union employees having their peaceful meal breaks interrupted by Union staff; (3) Union members were unwillingly spoken to by Union representatives; (4) Hotel's unhappiness with Union representatives presence in public areas of the hotel; (5) Union's disruptive behavior in public areas of the hotel (e.g., demonstrations in the lobby); (6) Union representatives talking to unit members (e.g., doormen or bellmen) while on the clock; (7) Union staff taking airborne samples inside the hotel; (8) Union representatives in inappropriate areas of the hotel (e.g., mechanical/boiler room); (9) distributing materials/flyers (i.e., door drops) in public and private spaces; and (10) Union representatives bringing non-employees onto the property without management's authorization. (G.C. Exh. 5, p. 4).[20] The Union then proposed changes for how it would access the hotel, including providing notice when Union representatives came for any purpose other than meeting with employees in the cafeteria, and seeking permission before engaging in activities such as distributing leaflets in the hotel. Respondent, through Evans, stated these were not concessions because the Union already was required to provide notice when it accessed the hotel and seek management's permission before distributing materials. The Union disagreed it was under any obligation to do either. During this session, Respondent showed the Union the room on the first floor of the Hotel it proposed allowing the Union to use in lieu of meeting with employees in the cafeteria.

Also, during the August 4 session, Iglitzin stated the Union had changed its prior bargaining positions on wages and health care. It was no longer seeking for the Hotel to participate in the Union's health benefit trust fund, nor seeking for the Hotel to match the wages paid at the nearby Captain Cook hotel. He stated the Union would provide specific proposals. (Tr. 245-246) (G.C. Exh. 5, pg. 7). There was no discussion about the 17-room requirement or successorship and assigns language.

On August 5, 2017, Evans emailed Glaser to recap the broad outlines of where the parties were regarding negotiations. (Jt. Exh. 37). Two days later, Evans sent Glaser a second email stating Respondent was flexible regarding the parties' next negotiation sessions, but it believed the next session should occur no later than mid-September. (Jt. Exh. 38).

On August 9, Glaser emailed Evans regarding negotiations. On the issue of Union access, Glaser noted Respondent had provided the Union with 10 reasons why it wanted to change the policy, and of those reasons 3 dealt with the Union's access to and use of the employee cafeteria; 4 dealt with the Union's conduct in areas of the hotel that are open to the public; and 3 involved Union access to non-public areas of the hotel. He reiterated that during bargaining, the Union stated it would be willing to agree to contract language that changed the status quo in two respects: the Union would agree to give notice before making use of access rights that is out of the ordinary, that is, other than routine entering the premises and meeting with bargaining unit members in the cafeteria; and the Union would agree to seek permission prior to engaging in certain types of highly unusual conduct that might conceivably be seen as going beyond mere "access" to the facility, such as having a demonstration in the lobby or putting flyers under guest doors. Contrary to the Respondent's assertions that providing notice and obtaining permission were already required, Glaser stated that these proposed changes would "significantly alter the status quo in the direction the Employer seeks, and should, in all fairness, have been accepted as such." (Jt. Exh. 39).

Glaser stated the Union would provide a written counterproposal regarding Union access, and it hoped to prepare "a concept" for a new wage proposal. He further stated the Union did not yet have enough information about the company health plan to develop a proposal on that topic, but it would do so as soon as it could. To that end, he requested a copy of the summary plan description for the company health plan. He stated he did not anticipate the Union being able to prepare a proposal addressing successorship anytime soon because of his focus on these more complex and important issues. (Jt. Exh. 39).

In this letter, Glaser reiterated his previous oral request for copies of "the employee complaints that were allegedly made about a Union representative's activities on site sometime in March 2017, providing the names of the employee(s) who allegedly complained, any written statement provided by such employee(s), and any other written documents, such as the recorded recollections of any management employees, that reveal the

[18] Glaser denied the Union asked Respondent for permission to have interns access the Hilton, and he stated he knew this because he had asked Esparza and Jones. Esparza and Jones did not testify on this topic. Overall, I credit Bhattacharyya over Glaser on this point, as I find it improbable that the Union would bring unknown individuals into the cafeteria without first notifying the Hotel and getting its permission, particularly after Respondent raised concerns about such conduct.

[19] During the August 3 bargaining session, there was a review of the current wages, hours, and terms and conditions of employment. Respondent's bargaining committee referred to a document called the "3-11-16 Terms Applicable," which contained terms that differed from the Implemented Agreement. The Union was unaware of how the different terms came into being and how they were being applied to the unit employees. The August 3 session was spent discussing the document and the Union asking questions.

[20] During this discussion, Iglitzin orally requested the names of the employees who allegedly complained about the Union representatives' conduct in the cafeteria. (Jt. Exh. 1) (G.C. Exh. 5, pg. 5).

substance of those alleged complaints." (Jt. Exh. 39).

On August 15, in response to Respondent's requests for future bargaining dates, the Union stated that Glaser and Iglitzin were both first available to travel to Anchorage for two successive days of bargaining on October 24 and 25. (Jt. Exh. 40).

On August 17, Evans wrote Glaser a letter regarding the scope of negotiations, stating:

> . . . .The access issue was the sole issue identified by the Hotel for bargaining. I thought I was very clear in my previous correspondence, but in case I was not, let me reiterate that the Hotel is not proposing any other changes to the terms and conditions of employment. Put even more clearly, the Hotel has not changed its position on any of the four areas you have identified for bargaining (i.e. wages, health care, 17-room requirement and successorship).
>
> In contrast, the Union has indicated that it has changed its position significantly on the four identified areas. Based on the Union's assertion that its position on the four identified areas has changed, the Hotel has agreed to bargain in good faith concerning these supposed changes. Accordingly, while the Hotel will bargain in good faith, it would be a mistake to conclude that our willingness to bargain signals an intention to offer our own proposals on any of the identified issues. We will certainly keep an open mind regarding any proposal the Union makes and will give it honest consideration.
>
> I am hopeful that I have clearly conveyed the Hotel's position and expectations. Unfortunately it is somewhat difficult to be specific because despite the Union indicating that it has significantly changed its position regarding the four identified issues, it has not provided any actual proposals. Strangely, despite telling us that your positions have significantly changed regarding the four issues, you also claim to need further information in order to define what your proposals actually are. Remarkably, you have even indicated that your proposal on "successorship" will not be forthcoming "anytime soon."
>
> . . . We have agreed to negotiate with you concerning any other changes you may propose, but we have no intention of forestalling negotiations on our access proposal indefinitely while we await the promised development of future proposals.

(Jt. Exh. 42, pgs. 2-3).

In this letter, Evans also stated Respondent would not provide the requested names of the employees who complained about the Union representatives because it did not "wish to place them at risk of any retaliation." (Jt. Exh. 42). Evans provided no additional information or basis for this concern.

On August 22, 2017, Glaser emailed Evans regarding the information request, stating: "In light of the hotel's position that these complaints contribute to the reasons why it wishes to modify the status quo policies regarding the access of union representatives to the hotel, we need to know, and I am hereby formally requesting that you provide, the name of each bargaining unit member who allegedly communicated these complaints to Mr. Bhattacharyya. We can only meaningfully address the employer's underlying concerns regarding access if we have a reasonable opportunity to do our own investigation regarding the substance of the complaints that allegedly gave rise to those concerns." (G.C. Exh. 6). Respondent finally provided the Union with this information on March 20, 2019. (Jt. Exh. 1, pg. 6).

On October 5, 2017, Evans sent Glaser an email asking if the Union required any additional information prior to bargaining. He also stated that Respondent's plan was to begin negotiations with the access issue, and that while Respondent had provided its proposal in March, it had not received any "written" counterproposal from the Union. With respect to the other issues the Union mentioned, Evans stated Respondent had not received "any formal proposals" from the Union, and he requested that if the Union intended to make any proposals to provide them to Respondent prior to the next bargaining sessions to enable them to be more efficient with their time. But if that was not possible, Respondent would certainly consider whatever the Union was able to present at the face-to-face bargaining session. (Jt. Exh. 43)

On October 9, 2017, Respondent discharged Bill Rosario, a Union supporter and member of its bargaining committee, following an investigation into his response to discovering mold in two hotel guestrooms.[21] A week later, on October 16, Glaser wrote Evans stating the Union was cancelling the October 24 and 25 bargaining sessions because of the trauma Rosario's discharge caused to the bargaining committee and the unit employees. Glaser proposed bargaining through correspondence rather than in-person sessions. To that end, he included the Union's proposal on wages and stated it would be providing proposals on health care, successorship, and room cleaning quotas. (Jt. Exh. 44). The Union's wage proposal sought across-the-board and specific wage increases, but they were no longer seeking parity with wages paid at the Captain Cook hotel. (Tr. 245-246; 364-366). On the issue of Union access, Glaser wrote as follows, referring to Respondent barring the interns from the hotel:

> Regarding Union access to the hotel, the hotel's recent decision to dictate to the Union who it may and may not designate as its agents, for the purpose 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. Once the legality of that decision has been adjudicated by the NLRB, we will be in a position to know the "starting line" (a/k/a, the status quo) from which those negotiations may proceed.

(Jt. Exh. 44).

Thereafter, Glaser and Evans exchanged correspondence regarding the cancellation of the October 23 and 24 bargaining sessions, the status of negotiations, and the parties' overall poor relationship. (Jt. Exhs. 45-47). On access, Evans stated the Union's explanation for why it could not make a counterproposal did not hold water because the Union was unable to formulate a counterproposal for five months prior to the dispute over the interns, and the proposed revisions do not address who can be a

[21] The Regional Director issued a complaint over Rosario's discharge. On November 14, 2019, following a hearing, Administrative Law Judge Mara-Louise Anzalone issued her decision (JD(SF)-39-19), dismissing the complaint.

Union representative, but rather where and when they can be in the hotel. (Jt. Exh. 45, pgs. 2-3). In a subsequent letter, Evans indirectly responded to the Union's wage proposal. He took issue with the Union's characterization of Respondent as "bad people" during their first bargaining session and the Union's ongoing boycott, stating:

> While we can meet and negotiate in good faith on issues such as increased wages, the reality is that it [is] difficult to fathom increasing any benefits while the Union is engaged in a vigorous campaign to financially harm the Hotel. Not only do we have to be conservative with our expenditures in order to guard against customers heeding the Union's call to boycott, it simply is difficult to offer a reward to a party whom you view as perpetually stabbing you in the back.

(Jt. Exh. 47, pg. 3).

On November 21, 2017, Evans sent Glaser a letter stating that based on the Union's dilatory tactics, Respondent planned to implement its revised Union access policy effective January 1, 2018, absent the parties reaching an agreement by the end of the year. (Jt. Exh. 48). On November 27, 2017, Glaser responded to Evans' letter, which he characterized as "an ultimatum," stating the Union believed that implementation of the access proposal, in the absence of an overall impasse, and at a time when the Hotel has not yet cured its prior access-related unfair labor practices or restored the status quo ante, would be unlawful. Nonetheless, Glaser stated the Union would meet to continue bargaining. (Jt. Exh. 49). The parties eventually agreed to meet on December 20.

At the December 20 bargaining session, the Union provided Respondent with written proposals on wages, health insurance, the 17-room cleaning requirements, successorship, and Union access. (Jt. Exh. 50). On wages, the Union proposed across-the-board increases and additional increases based on specific jobs/work performed. On health insurance, the Union accepted the company's health plan but proposed to limit the employees' costs and allow employees to bank hours worked in excess of 100 per month to maintain coverage if their hours later dropped below the coverage threshold and/or allow employees to pay a set amount per hour for each hour they fell below the threshold to maintain their coverage. On room cleaning requirements, the Union agreed to 17 rooms per day but proposed paying housekeepers an additional amount for each room cleaned beyond 15. On successorship, the Union proposed to modify the language from the expired agreement to lessen the obligations imposed in the event of a sale or transfer of the hotel. On access, the Union proposed to revise the language in Article IV to read as follows:

> Business representatives or other authorized representatives of the Union shall be permitted to visit the premises of the Employer at reasonable times during working hours provided such representatives provide notice to the General Manager or his designee of their presence on the premises. When visiting the Hotel, the Union representative shall sign in and out on a log maintained by the Employer at the front desk. The Union representative shall print and sign his name and record the time he entered and left the Hotel. When the Union representative notifies the General Manager in advance of his desire to visit the Hotel, the General Manager will make a room available for the Union representative to use. Meeting by the Union representative with Hotel employees may occur in that room, or in other nonworking areas (e.g., the employee cafeteria), at the Union's discretion. Provided: that Union representatives speaking with bargaining unit members in the employee cafeteria will not silence the room in order to make announcements to union-represented employees or otherwise engage in activities that unnecessarily interfere with the ability of non-represented employees and those represented employees who do not wish to listen to Union announcements or messages from socializing or enjoying their time in the cafeteria without such interruption. Provided further, that Union representatives will not take airborne or other samples from the Hotel, enter the Hotel's Mechanical Rooms, hold events with the media or elected officials inside the hotel, hold rallies or demonstrations inside the hotel, or place Union surveys or flyers under room doors occupied by guests, without first coordinating such activities with the Employer.

(Jt. Exh. 50, pg. 6).

Glaser and Evans exchanged letters summarizing the December 20 bargaining session and their respective positions on the status of negotiations. Glaser's letter, dated December 30, 2017, began by stating how the Union's proposals demonstrated significant movement on the key issues and broke any impasse that may have existed. (Jt. Exh. 51). And despite this movement, the Hotel had no response to the Union's proposals on health insurance, room attendant cleaning quotas, or successorship. On the issue of Union access, Glaser stated the Hotel was unwilling to alter the portion of its proposal that barred Union representatives from the employee cafeteria. "You were absolutely clear about this: the hotel will not yield on this point." (Jt. Exh. 51, pg. 3). As for wages, the Hotel stated it was unable to respond with a counterproposal because it could not predict its future profitability in light of the Union's continuing boycott activity. The Hotel maintained this position even after the Union pointed out the boycott activity would cease once a new contract was reached. Glaser concluded his letter by asking Evans to reconsider the Hotel's positions, consider the Union's proposals seriously, and communicate meaningful counterproposals on each of these issues (as well as any other issues) at its earliest convenience. (Jt. Exh. 51).

On January 5, 2018, Evans wrote a letter responding to Glaser in which he addressed each of the Union's proposals and the Hotel's rejection of those proposals.

> . . . . Your health care proposal allows for a non-union trust plan which I understand is an issue that is very significant to the Union, but which in fact simply reflects the current reality that has been in place for several years. While allowing the plan to be controlled by the Hotel, you have proposed economic requirements that would come very close to mirroring what a union-based trust plan would provide. Given the precarious state of health insurance nationally, the Hotel is not willing at this time to alter its existing coverage. We will certainly be looking for opportunities going forward that will make such coverage more affordable for both the Hotel and its employees. Should such an opportunity arise, we will, at that time, make a proposal to change the current plan.

> Similarly, your proposal for changing the existing 17-room requirement is not acceptable to the Hotel. The Hotel does appreciate the diplomatic manner in which you sought to permit a 17-room daily requirement while at the same time keeping faith with the Union's normal 15-room limitation. The manner in which this compromise was achieved makes it essentially a wage issue (with some exceptions) for the room attendants and would be preferably addressed in setting the wage rate for the room attendants that would include the expectation of the 17-room requirement.
>
> . . . . Given the difficult relationship that exists between the Union and the Hotel, the Hotel is not willing at this time to limit potential buyers by including the [proposed] successorship language. The Hotel is willing to agree to provide notice to the Union in the event of a sale but is not willing to mandate to the buyer the assumption of this Agreement….
>
> Similarly, we must reject your wage proposal. As I stated during our negotiation session it is very difficult to provide increased wages or benefits given the current animosity-laden relationship. As I previously mentioned, I was hopeful that face-to-face dialogue might improve the adversarial atmosphere and create greater trust as a building block for a mutual agreement. Unfortunately, the negotiations have failed in that respect…. It is difficult to reach agreement and provide additional benefits to the very people who are condemning you as engaging in bad behavior. Accordingly, while we are always willing to meet and negotiate in good faith the terms and conditions of the Hotel employees, we are not willing to change our considered positions in the absence of a respectful and good faith partner.
>
> Finally, with respect to the access issue, as stated during our meeting, the Union's counterproposal that continues to allow the point of contact to be the cafeteria is not acceptable to the Hotel. From the outset the Hotel has been very frank that its chief goal in making its proposal was to end the friction that exists in the sole place in the Hotel for both management and Union employees to enjoy a break. By having the Union representatives meet with employees in the cafeteria management employees are placed in a position where they have to alter their break periods or engage in other conduct to avoid the perception that they are engaging in surveillance. Moreover, because this issue was sparked by an employee complaint about the conduct of Union representatives in the cafeteria, the Hotel believes it would be best if a specifically designated meeting room was made available for the Union representatives to meet with those employees who wish to meet with the Union representatives and not involve others who may simply want to enjoy their break time.
>
> 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 counterproposals 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.

(Jt. Exh. 52).

Evans concluded his January 5 letter by stating the parties were at impasse, as the Hotel was unwilling to continue allowing access to the employee cafeteria and the Union made no counterproposals that did not include maintaining such access. As a result, the Hotel intended to implement its proposed changes to Article IV beginning January 15, 2018. (Jt. Exh. 52). The revised Union access policy was implemented on January 12, 2018. (Jt. Exh. 53).[22]

Glaser testified the Union did not request further bargaining based on Evans' January 5 letter, because the Union read the letter as stating Respondent was not going to bargain with the Union and had declared the Union were not good-faith bargainers. (Tr. 264).

Thereafter, Union representatives continued to visit the employee cafeteria without complying with the procedures set forth in the revised access policy. Management confronted the representatives about their non-compliance and then escorted them off the property. On January 22, 2018, General Manager Steve Rader wrote Marvin Jones a letter advising him that Union representatives were not complying with the implemented access policy, and if they continued it would be viewed as trespass and the police would be called. (Jt. Exh. 54). Three days later, Jones responded in a letter to Rader that the implementation of the revised access policy was not lawful and, until so directed by the Board or federal court, the Union did not intend to comply. (Jt. Exh. 55).

F. Contacting the Anchorage Police to Report Trespassing by Union Representatives

On January 31, 2018, at around 10 a.m., Dayra Valades and another representative went to the Hotel and spoke to employees in the employee cafeteria. Later that afternoon, two Anchorage Police Department officers appeared at the Union's office and spoke to Valades, asking her if she had been at the hotel earlier that day. The officers explained they had received a trespass call, and that they had been given a letter claiming there was an agreement stating the Union would not be at the hotel.[23] Valades provided the officers with a copy of Jones's January 25, 2018 letter to Rader challenging the legality of Respondent's

[22] The record does not reflect why Respondent implemented the revised access policy three days early.

[23] At the hearing, Rader testified he contacted the police after the Union representatives repeatedly failed to comply with the revised access policy. (Tr. 780-782).

implementation of the revised Union access policy. The officers read the letter and handed Valades a card with the police report number and date written on the back. (G.C. Exh. 7). No further action was taken.

On April 19, 2018, Jones informed Union employees during a quarterly meeting about the Anchorage Police Department visiting the Union hall regarding the alleged trespass call. (Tr. 823-824).

G. Postings to Employees

In June 2018, the Union posted the following, in English, on its bulletin board outside of the employee cafeteria:

> Brothers and Sisters,
> For those who are not aware, you have been in a labor dispute with your employer for the last 9 years. This dispute occurred because your employer wanted to take away your wage increases, health insurance, pension, work load, and job security. Obviously, this is a horrendous act by your employer. We've pushed back and have been able to maintain the majority of the benefits listed above. The only reason we've been successful, is because many of you have been courageous enough to stand up for what you deserve. Columbia Sussex will not give you these benefits unless all of us together demand that they give them to you. Because you have representation is the sole reason you keep the liberties you have working at the Hilton Anchorage. It is for certain that without the Union the Hilton will take all these benefits away from you. Workers without a Union means more money in the employer's pocket and less in yours.
>
> Some of you are saying that the fight has gone on too long, but we say that it's never too long to fight for what is right. Those who tell you to stop fighting are not looking at what's in your best interest. They want to discourage you from getting involved, they want you to quit because they think you're tired, they think you're weak, they don't think you know better, but you're not all what they think, and that's why you still have a pension, holiday pay, paid lunch break, job security, two 10 minutes paid breaks, representation, seniority, and many other benefits. Thousands of members over the last 75 years through Local 878 have fought for the rights and benefits you enjoy today. We owe those who come after us the same opportunity that we have and more. The employer makes a fortune off the backs of the workers, you give 1/3 of your life to the employer, and you should be provided with at least the basic necessities.
>
> As we move forward our motto has always been "one day longer" and when we say it, we mean it, denying the rights for some is denying the rights for all. We are fighting for wages, health care, job security, and all the benefits that your Union stands for. For those who think things are bad just think about how bad it would be if you weren't a member of Local 878! ALL the rights you have today would be gone
>
> DON'T BELIEVE THE LIES...
>
> We are fighting for, what you deserve. Support the brothers and sisters who stand on the picket line for a better life, not people who tell you to quit and won't be there when all that you have is gone.
>
> UNITED WE STAND, DIVIDED WE BEG!!!

(Jt. Exh. 56).

Later in June 2018, General Manager Steve Rader prepared and posted the following letter in response to the Union's letter. The letter was posted, in English and Spanish, on a company bulletin board by the time clock near the human resources office:

> Dear Valued Associates,
> As many of you are aware, it is not often that we send out letters to our employees regard our involvement with the union here at the Hilton Anchorage. However, there are times when we believe it is important to speak out and share our view point when the union is making outlandish and false claims against Columbia Sussex.
>
> When Columbia Sussex purchased the Hilton Hotel property almost 10 years ago, this property had union representation with UNITE HERE! At the time, this was the ONLY Hotel in our portfolio which had a union and we have respected the [union's] position as our [employees'] representative for the purposes of collective bargaining.
>
> Our company philosophy is clear, we want to have a direct working relationship with our employees to solve issues and do not believe having a 3rd party labor union involved is necessary. We are not anti-union, we are simply pro employee.
>
> We were recently made aware of a posting from the UNITE HERE! Local 878 in which they claim if you were not a member of the union, you could lose your Pension, Holiday Pay, Paid Lunch Break, Job Security, Two 10 Minute Breaks, Representation, Seniority and of Benefits (see attachment). This statement is simply not true and frankly is one of the most dishonest statements we can imagine.
>
> Employees at each of our hotels enjoy each of these benefits and more, and most without a union presence. The idea that you would lose any of these items is simply not true. Importantly, the notion that you have these items only because you have union representation is also not true. Again, employees in our other properties have these benefits and more and most do not have union representation. We believe we can achieve more by working together versus having a 3rd party divide us as can be seen in our other locations. Our intentions should clear that with the investment the company is making with our renovations, Columbia Sussex will be a contributing member of our Anchorage community for many years to come.
>
> We care a great deal for all associates and our managers welcome you to come to us with any concerns you may have for solutions that are satisfactory to you. In spite of the fact that most businesses in Anchorage are downsizing and cutting out employee benefits such as employee events, associate luncheons, associate rallies, and other events throughout the summer and the year.
>
> We appreciate the hard work you do and want the work place to be a team environment which includes fun and camaraderie in addition to the work which we accomplish together.

(Jt. Exh. 57).[24]

Legal Analysis

A. Surveillance of Employee Cafeteria

Paragraph 6(a) of the final amended consolidated complaint alleges Respondent violated Section 8(a)(1) of the Act since February 2017, when it engaged in unlawful surveillance by increasing the number of supervisors and/or managers in the employee cafeteria during the timeframe when the Union's representatives typically were there. I do not find merit to this allegation.

Section 8(a)(1) states it is a violation for an employer to interfere with, restrain or coerce employees in the exercise of their Section 7 rights. The Board has held that routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. *Aladdin Gaming, LLC*., 345 NLRB 585, 586 (2005). An employer violates Section 8(a)(1) when it surveils employees by observing them in a way that is "out of the ordinary" and thereby coercive. Id. Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. Id. Ultimately, the test is an objective one and involves a determination as to whether the employer's conduct, under the totality of the circumstances, would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 7. *Sage Dining Services, Inc*., 312 NLRB 845, 856 (1993); *Brown Transportation Corp*., 294 NLRB 969, 971-972 (1989).

In *Aladdin Gaming*, two employees solicited union authorization cards in the employee dining room that managers and employees used for meal breaks. As the employees talked with others about the union, a manager walked over to their table, stood by silently for 2 minutes, and then spent 8 minutes telling them management's perspective on unionization. Two days later, a different manager engaged in essentially the same conduct. The Board found no violation, holding that the employer did not act "out of the ordinary" because its managers routinely were in the dining room and their observation of employees was unaccompanied by any coercive conduct, as their statements about unions were protected under Section 8(c) of the Act. 345 NLRB at 586-587.[25]

The General Counsel argues it was out of the ordinary for multiple managers to be in the employee cafeteria when the Union representatives typically were there, and that changed starting on February 7, 2017, when management's presence went from only 1 to 2 (Daniel McClintock and Ivan Tellis), to around 3 to 6. The General Counsel cites to *Sheraton Anchorage*, 363 NLRB No. 6 (2015), for support as to how this increase violated the Act. In *Sheraton Anchorage*, managers increased their visits to the employee cafeteria when the union representatives typically were there speaking about union issues, at a time when employees were circulating both a decertification petition and a rival pro-union petition for signatures. The supervising chef who previously never went to the cafeteria during the day came and stood with his arms folded for up to 15 minutes as he monitored the employees; the housekeeping manager and the human resources director who seldom came to the cafeteria both began making multiple visits a week and staying for 30 minutes each time; and the engineering chief began coming to the cafeteria and talking with employees for 60-90 minutes a day, or for as long as the union representative(s) remained in the cafeteria. The administrative law judge held this "significantly increased" presence of management was out of the ordinary and thereby coercive, in violation of Section 8(a)(1).[26]

Here, unlike in *Sheraton Anchorage*, the evidence does not establish that management's presence significantly increased. As stated, Soham Bhattacharyya, Steve Rader, and Brandon Donnelly, along with McClintock and Tellis, regularly visited the cafeteria when the Union representatives were there, both before and after February 2017. The General Counsel asserts

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[24] Respondent also had posted somewhere on this same bulletin board its "Open Door Policy," which states:

> At CSM, we have created an environment in which open communication between associates and management can, and does, exist. We encourage you to communicate your ideas, suggestions, and problems to your department manager on a daily basis. When people work together, we know that misunderstandings may occur. If such a situation or problem should arise, we encourage you to talk first with your immediate supervisor and given him or her an opportunity to work it out with you. If your compliant involves your supervisor, or you are not satisfied with your supervisor's response, or if for any reason you do not wish to bring the problem to your supervisor's attention, you may present your concern to your department manager, General Manager, Corporate Human Resources, of the [W]histle Blower Hotline.

The company's policy is to encourage all associates to raise their ideas or concerns either individually or whenever management meets with associates as a group.

(R. Exh. 42).

[25] In *Aladdin Gaming, LLC*., the Board distinguished that case from others in which unlawful surveillance was found based on the coercive nature of the employers' conduct, including *Hawthorn Co*., 166 NLRB 251 (1967), enfd. in pertinent part 404 F.2d 1205 (8th Cir. 1969) (foremen began sitting at employee tables in the cafeteria, instead of at the foremen's table, during employees' coffee breaks, to monitor conversations); *Elano Corp*., 216 NLRB 691 (1975) (foremen were directed to eat in the lunchroom with employees when previously allowed to eat in a control room overlooking the plant floor); *Oakwood Hospital*, 305 NLRB 680 (1991), enf. denied 983 F.2d 698 (6th Cir.1993) (supervisors and managers instructed to remain in close proximity to a union representative while he was in the cafeteria, take down names of employees who met with him, and take notes during employees' conversations with him); *Liberty House Nursing Homes*, 245 NLRB 1194 (1979) (supervisors departed from the practice of taking breaks in a private dining room and, instead, deliberately mingled with employees in the dining area used by the latter during their breaks and lunch periods, including a supervisor who followed two employees who left the dining area, and on another occasion followed two employees who had changed tables because of the presence of supervisors, to talk with them about the union organizing effort); and *Teksid Aluminum Foundry*, 311 NLRB 711 (1993) (supervisors shadowed employees involved in union activities to break room, in and out of lunch room, and out to the parking lot, observing them for several minutes, over multiple days).

[26] In the absence of exceptions, the Board adopted the judge's finding of unlawful surveillance. *Sheraton Anchorage*, 363 NLRB No. 6, slip op. at 1 fn. 2. As such, the judge's decision only has persuasive value.

Bhattacharyya, Rader, and Donnelly could not have been in the cafeteria at that time because they attended the morning stand-up meetings, which, prior to January 2017, began at 10 a.m. However, those meetings lasted 25-30 minutes, which allowed managers enough time to get to the cafeteria to eat while the Union representatives were still there interacting with employees.

The General Counsel next argues that management's conduct while in the cafeteria was out of the ordinary and coercive. The first examples cited are the February 2017 management meetings. Respondent held 1 stand-up meeting and 1 or 2 meetings to recognize employees for their performance. While it may have been unusual for management to hold stand-up meetings in the cafeteria, Bhattacharyya testified that when he took over as General Manager in January 2017, he began to rotate where these meetings were held, and it was not unusual for him to hold them at various locations throughout the hotel. Nor was it unusual for management to hold meetings to recognize employees for their performance. Moreover, there is no evidence about what the managers and supervisors attending these meetings said or did; there is no evidence they monitored conversations or activities, made any statements, or engaged in any coercive behavior.

The General Counsel next cites to the instance in May when Bhattacharyya was observed talking with a unit employee in the large room of the cafeteria. There is no evidence about what was said or the length of the conversation. It was not uncommon for Bhattacharyya to be in the cafeteria, nor for him to briefly interact with employees while there.

Finally, the General Counsel cites to the two occasions in May when McClintock and Bhattacharyya allegedly followed Esparza as he moved throughout the cafeteria talking with employees. As for McClintock, Esparza testified the two were both in the large room, and at some point, after Esparza left to go to the small room, McClintock entered the small room with a plate of food. As stated, there is no evidence of what, if anything, McClintock said or did once he entered the small room. Nor is there evidence regarding where he sat in proximity to Esparza and the employees, or how long he remained there.

As for Bhattacharyya, Esparza was distributing flyers to employees in the large room about an upcoming Union rally, and Bhattacharyya asked if he could attend the rally. Esparza told him he could. Following that exchange, Esparza went into the small room to talk with employees, including a group of employees eating pizza. Bhattacharyya later entered the small room. After Esparza walked away, Bhattacharyya asked the employee if he could have some of their pizza, telling them he didn't care if Esparza made fun of him. While Bhattacharyya's conduct may have been unusual, his interactions with Esparza and the employees were brief and there is no evidence he monitored the employees, made any other statements, or engaged in any coercive behavior.

Overall, based on the limited evidence presented, the General Counsel failed to establish that employees reasonably would believe that management was in the cafeteria for the purpose of surveilling their protected activity. As stated, members of management regularly visited the cafeteria before and after February 2017, and they did so for the same reasons as other employees, to eat lunch or to take a break. Like other employees, the managers and supervisors greeted and occasionally engaged in conversation with employees while there. Unlike in *Aladdin Gaming,* management did not stand by listening to the employees' protected conversations; nor did it make statements or offer opinions about their protected activity. Accordingly, I dismiss the Section 8(a)(1) unlawful surveillance allegation.

B. Change in Established Past Practice

Paragraph 6 of the final amended consolidated complaint also alleges the increased presence of management in the cafeteria constituted a unilateral change in past practice over which Respondent failed to provide the Union with prior notice and an opportunity to bargain, in violation of Section 8(a)(5) of the Act. In her post-hearing brief, Counsel for General Counsel alleges the change was that unit employees went from being able to freely interact with their Union representatives during their lunch breaks, to only being able to interact with them in the presence of management. I do not find merit to this allegation.

Under the unilateral change doctrine, an employer's duty to bargain under Section 8(a)(5) includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' bargaining representative concerning the contemplated changes. *NLRB v. Katz*, 369 U.S. 736 (1962). An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. The party asserting the existence of a past practice bears the burden of proving the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis. *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 5, 8, 16, 20 (2017); *Howard Industries*, Inc., 365 NLRB No. 4, slip op. at 3-4 (2016).

In this case, the Union had a long-standing practice of regularly visiting the employee cafeteria between 10 a.m. and 11 a.m., but not at the exclusion of management. As stated, multiple managers were regularly present, both before and after February 2017. Esparza was not aware of "any sort of agreement" between Respondent and the Union that management would refrain from entering the employee cafeteria, or that Respondent would notify the Union before holding a meeting in the cafeteria when the Union representatives were present. (Tr. 223). Under these circumstances, there was no past practice or reasonable expectation that the Union would be able to meet with employees in the cafeteria at the exclusion of management. Accordingly, I also dismiss the Section 8(a)(5) unilateral change allegation.

C. Revised Access Proposal

Paragraph 10 of the final amended consolidated complaint alleges Respondent violated Section 8(a)(4) and (1) of the Act when it proposed revising the Union access policy on March 2, 2017, in retaliation for the Union filing its original unfair labor practice charge in Case 19-CA-193656 about the increased management presence in the cafeteria when the Union representatives were there.

Counsel for General Counsel moved to add this allegation at the conclusion of her case-in-chief, which I granted over Respondent's objections. I reaffirm that ruling now. Section

102.17 of the Board's Rules and Regulations authorizes the administrative law judge to grant complaint amendments "upon such terms as may be deemed just" during or after the hearing until the case has been transferred to the Board. In *Rogan Brothers Sanitation, Inc*., 362 NLRB 547, 549 fn. 8 (2015), the Board stated the judge should consider the following when permitting an amendment to the complaint during the hearing: (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated. In applying these factors, I found the General Counsel notified the other parties of the intent to amend shortly after Respondent introduced bargaining notes from their April 21, 2017 session. The notes show that Respondent referred to the Union's charge when discussing the reasons why it was making its proposal to change the access policy. The matter was fully litigated because Respondent was able to present evidence during its case-in-chief regarding as to its motivation for making that proposal. Respondent did not raise any further argument regarding the amendment in its post-hearing brief.

Respondent's final answer asserts this allegation is untimely under Section 10(b) of the Act.[27] Section 10(b) provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Thus, an unfair labor practice charge filed more than 6 months after the alleged unfair labor practice took place is untimely. The 10(b) period begins to run when a party has clear and unequivocal notice of an alleged violation of the Act. Notice can be actual or constructive. *Moeller Bros. Body Shop*, 306 NLRB 191, 192-193 (1992). The Board, however, has held that "the timely filing of a charge tolls the time limitation of Section 10(b) as to matters subsequently alleged in an amended charge which are similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge. Amended charges containing such allegations, if filed outside the 6-month 10(b) period, are deemed, for 10(b) purposes, to relate back to the original charge." *Pankratz Forest Industries*, 269 NLRB 33, 36-37 (1984), enfd. mem. sub nom. 762 F.2d 1018 (9th Cir. 1985)).

The Union had clear and unequivocal notice as of the April 21 bargaining session that Respondent wanted to revise the Union access policy, in part, because of the allegations the Union raised in its charge alleging Respondent unilaterally changed the status quo by holding meetings and having management present in the cafeteria at times when the Union representatives were there talking with employees. Therefore, the Section 8(a)(4) allegation, which was first raised on October 30, 2019, is well outside the Section 10(b) period.

The General Counsel nevertheless contends the allegation was timely because it was "closely related" to the allegations in the original and amended charge in Case 19-CA-193656. In determining whether an amended charge relates back to an earlier charge for 10(b) purposes, the Board applies the test set forth in *Redd-I, Inc*., 290 NLRB 1115, 1118 (1988). In *Redd-I*, Inc., the Board stated:

> In applying the traditional "closely related" test in this case, we will look at the following factors. First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act... Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object... Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

Id. at 1118.

In *Carney Hospital*, 350 NLRB 627, 630 (2007), the Board held the second prong "is not shown simply because two events occurred close in time, during the same organizing campaign or in response to a campaign. Mere chronological coincidence does not warrant the implication that all challenged employer actions are related to one another as part of a planned response to that campaign." The Board further held the second prong of the *Redd-I* test is satisfied "where the two sets of allegations demonstrate similar conduct, usually within the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity." Id. (internal quotations and citations omitted).

In applying the closely related test, I find the first factor--same class of violations--is not met. The charges in Case 19-CA-193656 allege Respondent unilaterally changed its past practice without bargaining with the Union, in violation of Section 8(a)(5) of the Act, and engaged in unlawful surveillance, in violation of Section 8(a)(1) of the Act. These allegations involve different provisions of the Act and different legal theories than the added Section 8(a)(4) retaliation allegation. Section 8(a)(4) provides it is an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." To prove an 8(a)(4) violation, there must be proof of unlawful motivation and animus. See *American Gardens Mgmt. Co*., 338 NLRB 644, 645 (2002). Motive is irrelevant to proving unilateral change or surveillance allegations.

The second factor--same factual situation or sequence of events--appears to be met. Respondent began holding

[27] Respondent's final amended answer raises as an affirmative defense that certain allegations are untimely under Section 10(b), but it does not specify which allegations. See *United Government Security Officers of America International*, 367 NLRB No. 5, slip op. at 1 fn. 1 (2018) (respondent must specify the allegation it asserts is untimely under Section 10(b); a mere boilerplate or catchall provision in the answer is insufficient). However, when Counsel for General Counsel orally moved to amend in this Section 8(a)(4) allegation, Respondent's counsel orally denied the allegation, in part, as being untimely. (Tr. 541-542). I interpret Respondent's oral and written responses together as properly asserting this allegation as untimely under Section 10(b).

management meetings in the cafeteria starting on around February 7, 2017. The Union filed the original charge on February 22. Eight days later, Respondent notified the Union it wanted to revise the Union access policy to limit where and when the Union representatives could access the hotel. As stated, the bargaining notes from the April 21 session show Respondent sought to revise the policy, in part, to address the claims the Union raised in its charge. Although the two sets of allegations do not involve similar conduct and are not necessarily within the same time period, there is a nexus between the filing of the charge and the subsequent proposal to change the policy to address the claims raised in the charge.

The third factor—same defenses—is not met. As stated, proving an 8(a)(4) violation requires proof of unlawful motivation and animus. If established, the employer defends by proving that it would have taken the same adverse action in the absence of the protected activity. *American Gardens Mgmt. Co*., supra. There is no comparable defense to unilateral change or surveillance allegations.

For these reasons, I dismiss the 8(a)(4) allegation as untimely under Section 10(b).[28]

D. Responding to Information Requests

Paragraph 9 of the final amended consolidated complaint alleges, as amended at hearing, that Respondent violated Section 8(a)(5) of the Act when from January 3, 2017, to about June 2, 2017, it failed or refused to provide the Union with the requested schedules, time cards, and payroll records for bussers working at the hotel's Hooper Bay restaurant; and from about August 17 and 22, 2017, to March 19, 2019, failed or refused to provide the Union with the names of the employees who complained the Union was forcing them to agree to voice recording. I find merit to these allegations, as amended.

Under Section 8(a)(5) of the Act, the employer has a duty to provide the union with requested information that is relevant and necessary to its representational duties. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In general, information relating to bargaining unit employees and their wages, hours, and terms and conditions of employment is presumptively relevant and must be furnished. *North Star Steel Co*., 347 NLRB 1364 (2006); *Bryant & Stratton Business Institute*, 323 NLRB 410 (1997). It is the employer's burden to rebut that presumption. *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); and *Southern California Gas Co*., 344 NLRB 231, 235 (2005).

The Board has held an unreasonable delay in furnishing relevant information is as much a violation of Section 8(a)(5) as failing or refusing to provide the information. *PAE Aviation and Technical Services, LLC*., 366 NLRB No. 95, slip op. at 3 (2018). It is an employer's duty to furnish relevant information as promptly as possible, given the circumstances, as a union is entitled to the information at the time the information request is made. Id. In determining whether a party has failed to produce information in a timely manner, the Board considers the totality of the circumstances, including "the nature of the information sought (including whether the requested information is time sensitive); the difficulty in obtaining it (including the complexity and extent of the requested information); the amount of time the party takes to provide it; the reasons for the delay in providing it; and whether the party contemporaneously communicates these reasons to the requesting party." *General Drivers, Warehousemen & Helpers Local Union No. 89*, 365 NLRB No. 115, slip op. at 2 (2017). This determination is an objective one; the focus is not on "whether the employer delayed in bad faith ... but on whether it supplied the requested information in a reasonable time." *Management & Training Corp*., 366 NLRB No. 134, slip op. at 3 (2018).

Although there is not a per se rule for what constitutes an unreasonable delay, the Board has found delays from 2-16 weeks to be unreasonable. See *Capitol Steel & Iron Co.*, 317 NLRB 809 (1995) (2 weeks unreasonable); *Aeolian Corp*., 247 NLRB 1231, 1245 (1980) (3 weeks unreasonable); *Postal Service*, 308 NLRB 547, 551 (1992) (4 weeks unreasonable); *Postal Service*, 332 NLRB 635 (2000) (5 weeks unreasonable); *Linwood Care Center*, 367 NLRB No. 14, slip op. at 5 (2018) (6 weeks unreasonable); *Woodland Clinic*, 331 NLRB 735, 737 (2000) (7 weeks unreasonable); and *Regency Service Carts*, 345 NLRB 1286 (2005) (16 weeks unreasonable).

The Union articulated how the requested information at issue is both relevant and necessary to its representational duties. In the January 3, 2017 email request for information on the bussers, Marvin Jones explained to Soham Bhattacharyya that the Union was requesting the information to investigate whether Respondent had violated the terms of the agreement by reducing the bussers' hours and/or by reassigning their duties to wait staff. Similarly, in David Glaser's August 22, 2017 email to Bill Evans requesting the employee complaints, he explained the Union needed the information considering that these complaints were part of the reason why Respondent wanted to modify the Union access policy.

Respondent argues that Bhattacharyya's delay in providing

[28] Assuming arguendo the allegation had been timely, the General Counsel failed to establish that Respondent was motivated by animus in preparing and submitting the revised access policy. The General Counsel relies on the timing of the announced change eight days after the Union filed the charge to prove animus. Bhattacharyya, however, began making the proposed revisions to the access policy, with the assistance of counsel, in late January and early to mid-February 2017, because he wanted greater formality and consistency with how, when, and where the Union representatives accessed the hotel. He waited until March to submit the proposal because Respondent was attempting at the time to secure refinancing, and he was concerned the Union would try to interfere with that process if it knew the Hotel wanted to revise the access policy. Considering the Union's other attempts to exert economic pressure on Respondent, this concern was not unreasonable. The General Counsel also cites to the statements made by Respondent's bargaining representatives during the April 21 bargaining session as proof the proposed changes were in retaliation for the Union filing the charge. However, the statements show Respondent wanted to bargain over the proposed policy as a means of addressing the Union's stated concerns of having managers in the cafeteria, not as demonstrating animus for the Union raising those concerns in the charge. Based on the foregoing, the General Counsel failed to prove the proposed revisions were in retaliation for the Union's Board activity.

Jones with the bussers' information was inadvertent, and that it should not be found to have violated the Act in light of its history of promptly responding to the Union's other information requests, and because the Union failed to follow-up regarding its request before filing the amended charge.[29] I reject these arguments. As stated, the issue is not whether the employer delayed in providing the information in bad faith, but rather whether it supplied the information in a reasonable time, and there is no obligation for a union to make a subsequent request for information when the initial request was received and the information sought was clear. Moreover, even if Bhattacharyya's initial delay in providing the information was inadvertent, that does not explain why, after the Union amended its charge on April 20, 2017 to specifically allege Respondent had failed or refused to provide the requested information, Respondent waited 7 additional weeks to provide it to the Union.

Respondent raises three arguments for its delay in providing the names of employees who complained the Union was forcing them to agree to voice recording. First, it argues the Union already possessed the information at issue because it knew which employees Esparza approached about getting a voice-recorded statement, and Respondent had no obligation to provide information already in the Union's possession. While the Union likely had knowledge of which employees Esparza approached, the request was for the names of the employees who "complained" to management that the Union "was forcing them" to agree to voice recording, and there is no evidence the Union had that information.

Second, Respondent argues the Union's request was not made in good faith because it waited several months before requesting the information and it was merely an attempt to delay an agreement on the Union access policy. "[T]he presumption is that the union acts in good faith when it requests information from an employer until the contrary is shown." *Hawkins Construction Co*., 285 NLRB 1313, 1314 (1987), enf. denied on other grounds 857 F.2d 1224 (8th Cir. 1988); *International Paper Co.*, 319 NLRB 1253, 1266 (1995), enf. denied on other grounds 115 F.3d 1045 (D.C. Cir. 1997). The requirement of good faith "is met if at least one reason for the demand can be justified." *Hawkins Construction*, supra at 1314. Respondent argues Bhattacharyya informed the Union of the employee complaints about the voice-recording on March 3, but the Union did not request the information until five months later, in August. The August 3 and 4 bargaining sessions were the first time Respondent raised the employee complaints as one of the reasons it was proposing to revise the Union access policy, and Glaser orally requested the information during the August 4 bargaining session and then followed that up with written requests. Respondent presented no evidence this request was for any other purpose than to bargain over the policy.

Third, Respondent argues it withheld the information to shield its employees from possible retaliation. In *American Baptist Homes of the West*, 362 NLRB 1135 (2015), enfd. in relevant part 858 F.3d 612 (D.C. Cir. 2017), the Board held that when an employer argues it has a confidentiality interest in protecting requested information from disclosure, it shall apply the balancing test set forth in *Detroit Edison v. NLRB*, supra, in which the Board balances the union's need for the relevant information against any legitimate and substantial confidentiality interests established by the employer. *American Baptist Homes*, 362 NLRB at 1137. Establishing a legitimate and substantial confidentiality interest requires more than a generalized desire to protect the integrity of investigations. Id. An employer must determine whether any given witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a coverup. If such a showing is made, the Board weighs the interest in confidentiality against the need for the information. Id.

Here, Respondent has presented no evidence or argument to explain why its confidentiality interests should prevail over the Union's need for the requested information. In his August 17 letter, Evans stated Respondent would not provide the names of the complaining employees because it did not "wish to place them at risk of any retaliation." Evans provided no basis for this stated concern. There is no evidence that Esparza or any Union official had a history of threatening, intimidating, or retaliating against employees for raising complaints against the Union, or that the Union sought the employees' names for that purpose. Even if employees expressed concern about harassment or retaliation---and there is no evidence that any did---Respondent failed to establish a reasonable expectation that disclosure of the names would lead to such activity. See *American Medical Response West*, 366 NLRB No. 146, slip op. at 4 (2018).

Additionally, even if the confidentiality interest outweighs the requester's need for the requested information, the party asserting confidentiality may not simply refuse to provide it. It must seek an accommodation that allows the requester to obtain the information it needs while protecting the party's interest in confidentiality. *American Baptist Homes of the West*, 362 NLRB at 1137; and *General Drivers, Warehousemen & Helpers Local Union No. 89*, 365 NLRB No. 115, slip op. at 3. The burden of formulating a reasonable accommodation is on the employer; the union need not propose a precise alternative to providing the requested information. *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004). Respondent did not attempt, let alone satisfy, its duty to come forward with an appropriate accommodation in this case.

Overall, I find Respondent unreasonably delayed in providing the above requested information.

E. Barring Interns

Paragraph 6(b) of the final amended consolidated complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally restricted Union access by barring the interns without providing the Union with prior notice and an opportunity to bargain. I find merit to this allegation.

A union's ability to access the employer's property for representational purposes is a mandatory subject of bargaining that

[29] In support of this theory, Respondent relies solely on *U.S. Postal Service*, 352 NLRB 1032 (2008), which is a two-member Board decision that has no precedential force as it was not subsequently adopted by the Board or the Court of Appeals after *New Process Steel*, 560 U.S. 674 (2010).

may not be unilaterally changed. *Meadowlands View Hotel,* 368 NLRB No. 119 (2019). The Board has consistently found a violation when the employer has unilaterally reduced or changed access for union representatives. See e.g., *Desert Springs Hospital Medical Center*, 369 NLRB No. 16, slip op. 2 (January 30, 2020) (unilateral change prohibiting union representatives from meeting with unit employees in breakroom while non-bargaining unit employees present unlawful); *Turtle Bay Resorts*, 355 NLRB 1272 (2010), enfd. 452 Fed. Appx 433 (5th Cir. 2011) (unilateral change in past practice by no longer validating parking for business agents present at resort for representational purposes unlawful); *Frontier Hotel & Casino*, 323 NLRB 815, 818 (1997), enfd. in pertinent part 118 F.3d 795 (D.C. Cir. 1997) (unilateral change to require representatives to sign copy of access policy prior to entering facility unlawful); *Ernst Home Centers*, Inc., 308 NLRB 848, 848-849 (1992) (unilateral change to practice of permitting business representatives to have limited conversations with employees on sales floor by imposing restrictions that all conversations occur in the breakroom or lunchroom unlawful); *BASF Wyandotte Corp*., 274 NLRB 978 (1985), enfd. 798 F.2d 849 (5th Cir. 1986) (unilateral changes to providing union office space and access to equipment unlawful).[30]

The General Counsel argues there is both a contractual right and established past practice affording interns access to the hotel. Article IV grants interns as "other authorized representatives of the Union" access to the hotel. This access provision is a term and condition of employment that survives contract expiration and cannot be modified without providing prior notice and an opportunity to bargain. *Meadowlands View Hotel*, supra slip op. at 16. The interns also accompanied the Union representatives to the hotel to interact with unit employees for representational purposes. According to David Glaser, the interns primarily spoke to the J1-visa employees working at the hotel about the Union. An employer may not modify an established practice relating to access without bargaining with the union. *Turtle Bay Resorts*, supra at 1272. By unilaterally barring the interns, Respondent denied or reduced the Union's access for representational purposes, which constitutes a material, substantial, and significant unilateral change over which Respondent failed to bargain.

Respondent cites to *Fred Meyer Stores, Inc*., 368 NLRB No. 6 (2019), for support that an employer may exclude non-employee union representatives from its property even when the contract grants access. In that case, the Board held the employer did not violate the Act when it denied representatives access because the union departed "dramatically" and "unreasonably" from its established past practice when it sent 8 representatives (as opposed to its normal 1 or 2) to the store floor for several minutes to get employees to sign a petition. Here, by contrast, the Union did not exceed the scope of the contractual right nor its established past practice. On the day in question, the Union sent the same number of representatives, at the same general time, to the same location as it had on a daily basis for the last several years.

Respondent further argues it had the right to bar the interns because they went to another hotel, the Anchorage Marriott, and engaged housekeeping staff members there about their working conditions while they were working. Respondent contends the interns' conduct at the Anchorage Marriott was a legitimate nondiscriminatory reason for barring them from both hotels. Respondent's argument is misplaced; as the Board has held, even where abuses may warrant changing the practice, "[t]he Act requires that, instead of implementing its own solution to perceived abuse, the [employer must] bargain with the [u]nion over possible solutions to any problems with access." *Frontier Hotel*, 323 NLRB at 817. Because Respondent never notified or offered to bargain with the Union prior to unilaterally barring the interns from the hotel, it violated Section 8(a)(5).

F. Bad-Faith Bargaining, Declaration of Impasse, and Unilateral Implementation of Revised Union Access Policy

Paragraph 8 of the final amended consolidated complaint alleges that since about January 5, 2018, Respondent has violated Section 8(a)(5) and (1) of the Act when it failed and refused to bargain in good faith with the Union, including failing to make counterproposals, ceasing negotiations, refusing future bargaining, and unilaterally implementing its revised access policy.[31]

Section 8(d) of the Act imposes "a mutual obligation on the [parties] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement ... but such obligation does not compel either party to agree to a proposal or require the making of a concession..." That being said, the obligation to bargain in good faith requires more than just going through the motions; it requires that parties approach bargaining with a "serious intent to adjust differences and to reach an acceptable common ground." *NLRB v. Truitt Mfg.*, 351 U.S. at 155. See also *Regency Service Carts*, 345 NLRB 671 (2005); *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. sub nom. 308 F.3d 859 (8th Cir. 2002); and *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003). The Board examines the totality of a party's conduct to determine if it has met its obligation to bargain in good faith. See *Public Service Co. of Oklahoma*, supra; *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

During contract negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991),

[30] In *Peerless Food Products*, 236 NLRB 161 (1978), the Board found the employer did not make a material, substantial, or significant change when, while continuing to allow union representatives access to the facility to discuss union matters with employees, it barred the representative from "engag[ing] unit employees in conversations on the production floor when those conversations are unrelated to contract matters." 236 NLRB at 161. In *Frontier Hotel*, 323 NLRB at 818, the Board clarified that in *Peerless* "the Board found no violation because it found no evidence that the employer actually had applied, or intended to apply, the rule so as to reduce the access of union representatives to employees for any representational purpose."

[31] At hearing, Counsel for General Counsel amended this paragraph to change the date of alleged offending conduct from since February 2017, to since about January 5, 2018. (G.C. Exh. 11).

enfd. mem. sub nom 15 F.3d 1087 (9th Cir. 1994). The limited exceptions to this rule are: (1) when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining; or (2) when economic exigencies compel prompt action. Id., *R.B.E. Electronics of S.D.*, 320 NLRB 80, 81 (1995).

"[I]mpasse is ... that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health & Welfare Trust Fund v. Advance Lightweight Concrete Co.*, 484 U.S. 539, 543 fn. 5 (1988). To determine whether impasse has been reached, the Board considers the totality of the circumstances, including "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Stein Industries, Inc.*, 365 NLRB No. 31, slip op. at 3 (2017) (quoting *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), review denied sub. nom. *Television Artists AFTRA v. NLRB*, 392 F.2d 622 (D.C. Cir. 1968)). Both parties must believe they are at the end of their rope and that further bargaining would be futile. *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993)). The party claiming impasse has the burden of proving its existence. *Dish Network Corp.*, 366 NLRB No. 119, slip op. at 2 (2018).

The General Counsel argues Respondent was obligated to bargain toward an agreement or impasse on each of the key issues (i.e., wages, health care, 17-room cleaning requirement, successor/assigns language, and Union access). Respondent was only willing to bargain over Union access. It rejected each of the Union's proposals, including its access counterproposal, without making any counterproposals, and it effectively ended bargaining when it refused to change its considered positions "in the absence of a respectful and good faith partner," declared impasse, and implemented the revised access policy.

Respondent counters that the sole purpose of the negotiations was to bargain over access, and the Union sought to expand the negotiations to include issues over which the parties had been, and continued to be, at impasse. The Union delayed bargaining for over 10 months until it finally submitted its initial access proposal on December 20, which Respondent rejected because the Union would not yield on unconditional access to the cafeteria. As such, because of the Union's failure to make any meaningful movement on access to the cafeteria, Respondent declared impasse and set a timeline for implementation of its revised policy. Respondent further contends it did not refuse to bargain over the Union's other proposals. Instead, it argues, the Union failed to seek further bargaining after December 20, 2017, and it, and not Respondent, is responsible for the bargaining hiatus that has occurred since then.[32] As set forth below, I find Respondent's defenses unavailing.

Prior Impasse

The parties do not dispute they were at impasse at the end of their 2014 contract negotiations. However, the Board has held the existence of an impasse "merely suspends the duty to bargain over the subject matter of the impasse until changes in circumstances indicate that an agreement may be possible." *Airflow Research & Mfg. Corp.*, 320 NLRB 861, 862 (1996) (footnote omitted). Anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse and revives an employer's obligation to bargain over the subjects of the impasse. Id. (citing *Gulf States Mfrs. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983) (impasse may be broken by a strike, a change in the union's bargaining position, a change in negotiators, and the passage of time)). See also *Civic Motor Inns*, 300 NLRB 774, 775 (1990) ("intervening event ... likely to affect the existing impasse or the climate of bargaining."). A substantial change in bargaining position will revive the employer's obligation to bargain over the subject of the impasse. *KIMA-TV*, 324 NLRB 1148, 1151-1152 (1997). The party asserting a broken impasse has the burden of proving changed circumstances that would justify such a finding. See *Serramonte Oldsmobile v. NLRB*, 86 F.3d 227, 233 (D.C. Cir. 1996).

The General Counsel argues the 2014 impasse was broken by the time the Union submitted its December 20, 2017 proposals because they reflected substantial changes in its bargaining positions on wages, health care, and the 17-room cleaning requirement.[33] In 2014, the Union sought to have Respondent pay employees the same wages as at the Captain Cook hotel, continue to participate in the Union's health trust fund and pay the

[32] Respondent contends it entered into an April 9, 2019 informal Board settlement agreeing to, upon request, resume bargaining with the Union, but the Union never requested to bargain. As stated, the Union did not enter into this settlement, and it was never approved by the Regional Director. Setting that aside, under the terms of the settlement, Respondent was required to take certain affirmative steps, such as rescinding various unilateral changes, and there is no evidence Respondent took those steps. I decline to find the Union at fault for failing to request bargaining following a "settlement" where the evidence does not establish Respondent effectuated the terms of that settlement. A union must not be forced to commence bargaining from a disadvantageous position, or bargain from a hole, caused by the employer's unremedied unilateral changes. *Covanta Energy Corp.*, 356 NLRB 706, 730 (2011); and *Intermountain Rural Elec. Assn.*, 305 NLRB 783, 789 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993).

[33] In brief, the General Counsel contends the impasse was broken earlier when the Union advised Respondent it was "prepared to make substantial movement" off its prior positions and intended to submit proposals on the key subjects. The Board has held a party's bare assertions of flexibility on issues and its generalized promises of new proposals do not clearly establish any change, much less a substantial change, in that party's negotiating position. *Holiday Inn Downtown-New Haven*, 300 NLRB 774, 776 (1990). See also *KIMA-TV*, 324 NLRB at 1151-1152 (mere "willingness" to be reasonable and flexible in bargaining position is not enough). There must be "substantial evidence in the record that establishes *changed circumstances* sufficient to suggest that future bargaining would be fruitful." *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 233 (D.C. Cir. 1996) (emphasis in original)). The General Counsel does not cite to an earlier date(s) when the impasse allegedly was broken; only that it was broken by the time the Union submitted its December 20 proposals. However, I need not reach the issue of whether the impasse was broken at an earlier date because the amended allegation is that Respondent failed to bargain since around January 5, 2018. As such, the focus is on whether the prior impasse had been broken by that date.

increased contribution amounts, and reduce in the room cleaning requirement from 17 to 15 rooms.[34] In its December 20, 2017 proposals, the Union abandoned or modified these positions. It no longer sought parity with the Captain Cook hotel. Instead, it proposed across-the-board and specific wage increases to wage rates below those paid at the Captain Cook. The Union also no longer proposed Respondent's participation in the Union's health benefit trust fund. Rather, it agreed to remain in the company health insurance plan, with changes to employee costs, modified eligibility requirements, and the creation of accrued hour banks. The Union also no longer proposed reducing the room cleaning requirement to 15 rooms. Instead, it proposed paying additional compensation for each room cleaned beyond 15. Evans acknowledged this as a "compromise," but one Respondent would rather consider when addressing wages.

Respondent argues these were merely symbolic gestures. I disagree. These changes reflected substantial movement on key issues and created the possibility of further fruitful discussions. Overall, they were sufficient to break the impasse and revive Respondent's obligation to bargain over those issues.

Alleged Dilatory Tactics

The General Counsel contends that once the impasse was broken, Respondent was obligated to refrain from implementing its revised access policy unless and until an overall impasse was reached. Respondent counters it was not required to do so because the Union continually avoided or delayed bargaining by, among others, failing to promptly provide bargaining dates, not having representatives available to meet for long periods of time, making multiple requests for information that bore no relationship to the access issue, promising but failing to make proposals aimed at breaking the impasse, and using Rosario's discharge to cancel bargaining sessions, which resulted in a five-month bargaining hiatus.[35]

The record does not support Respondent's claim that the Union continually delayed or avoided bargaining. From the outset, the Union advised Respondent that because of the severity of its access proposal, which would limit the Union's long-standing practice of interacting daily with unit employees at the hotel during their lunch breaks, it wanted to reopen negotiations and discuss rules on access as part of an overall agreement. The Union was open with Respondent about its willingness to consider such rules in exchange for agreement on other key issues, such as wages and health care. The Board has held the very nature of collective bargaining presumes that while movement may be slow on some issues, a full discussion of other issues may result in agreement on the stalled matters. *Royal Motor Sales*, 329 NLRB 760, 772 (1999). "Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas." *Anderson Enterprises*, 329 NLRB 760, 772 (1999), enfd. 2 Fed. Appx. 1 (D.C. Cir. 2001) (quoting *Korn Industries v. NLRB*, 389 F.2d 117, 121 (4th Cir. 1967)).

The parties did not meet from May through July 2017, because of the Union's scheduling conflicts and its outstanding requests for information. Contrary to Respondent's assertions, the requested information related to bargaining topics, including access, and the Union needed the information to help formulate its bargaining proposals and counterproposals.

At the August 4 session, the Union did not avoid or delay discussing access. It offered to start negotiations with that topic. The parties then the session discussing Respondent's stated reasons for wanting to revise the existing contractual language. After the parties discussed Respondent's concerns, the Union orally proposed to provide Respondent notification and seek its permission when it came to access the hotel for certain purposes, other than for meeting with employees in the cafeteria. Respondent rejected this proposal. The Union later reiterated its positions in a letter. Respondent replied that while it would keep an open mind regarding any proposal the Union made, it did not intend to make any proposals on wages, health care, the 17-room cleaning requirement, or successorship, as its positions on those topics had not changed. Respondent also stated it would not forestall negotiations over its access proposal indefinitely while it awaited the Union's promised future proposals on these other topics.

In mid-August, the parties agreed to next meet for bargaining on October 24 and 25, because that was the first time the Union's two chief negotiators (Glaser and Iglitzin) were available to travel to Anchorage for two consecutive days of bargaining. The subsequent cancellation of these October bargaining sessions was not dilatory; it was the Union's response to a perceived attack on its bargaining committee members and supporters through the discharge of Rosario. And while the Union cancelled face-to-face bargaining, it did not cut off bargaining altogether. Glaser proposed to continue negotiations through correspondence, and he included a copy of the Union's written wage proposal. Respondent rejected the proposal, citing to the Union's characterization of Respondent as "bad people" and the ongoing boycott of the hotel.

Respondent bewails the timing and content of the Union's proposals while refusing to alter its position on any of the key issues, despite the Union's stated willingness to enter into a quid pro quo arrangement. Respondent, instead, wanted the Union to relinquish its primary method of communicating with unit members in exchange for little or nothing. Upon the entire record, I conclude that Respondent did not approach the negotiations with the attitude of settlement through give and take which the Act requires. See generally, *Endo Laboratories, Inc.*, 239 NLRB 1074, 1075 (1978) (recognizing "the kind of 'horsetrading' or "'give-and-take' that characterizes good-faith bargaining").

Alleged Single Issue Impasse

Respondent next argues impasse was reached when the parties deadlocked over access. The Board has held that an overall impasse may be reached based on a deadlock over a single issue. *Atlantic Queens Bus Corp*., 362 NLRB 604 (2015) (citing *Cal-Mat Co*., 331 NLRB 1084, 1097 (2000)). The party asserting a

[34] In 2014, the Union made a proposal addressing the successors/assigns language, which Respondent rejected. The record, however, does not reflect what the Union's proposal was at the time. This precludes a determination as to whether there was a substantial change in the Union's position on that topic from 2014 to 2017.

[35] In its final answer, Respondent claims as an affirmative defense that its actions were justified by special circumstances or economic necessity. But it did not present evidence or argument to support either. I, therefore, consider these defenses as waived.

single-issue impasse has the burden to prove: (1) that a good-faith impasse existed as to a particular issue; (2) that the issue was critical in the sense that it was of "overriding importance" in the bargaining; and (3) that the impasse as to the single issue "led to a breakdown in overall negotiations." Id. (quoting *Cal-Mat*, 331 NLRB at 1097). Respondent argues it repeatedly stressed to the Union that the revised access policy was of high importance. Although Respondent agreed to consider other proposals, it was adamant about its objective and not wanting to be held up while the Union spent many months claiming to be "hard at work" on other proposals. When it became clear that the Union would not yield on unconditional cafeteria access, Respondent declared impasse and announced a timeline for implementation of the revised policy.

Based on my review of the evidence, I find Respondent has failed to meet its burden. First, the parties were not at impasse over access. The Union made concessions in its December 20 counterproposal reflecting a substantial change in its bargaining position on this matter, and, contrary to Respondent's claims, there is no indication the Union was at the end of its rope, or that it would not yield on unconditional cafeteria access. Initially, the Union wanted to maintain the existing language in Article IV. Later, at the second bargaining session, the Union orally offered to provide management with notification and seek permission when its representatives accessed the hotel for purposes other than for meeting employees in the cafeteria. The parties disputed whether that amounted to an actual change or simply reflected the existing obligations under the contract. That dispute is immaterial because the Union's December 20 counterproposal went even further. In it, the 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 the hotel, or place Union surveys or flyers under guestroom doors, without first coordinating such activities with management. Each of these were in direct response to reasons Respondent stated for why it wanted to revise Article IV. Respondent, however, contends the Union did not go far enough because it did not completely relinquish access to the employee cafeteria. While the Union may not have gone as far as Respondent wanted, the Union made a substantial change in its position and moved the parties closer toward an agreement. *Larsdale, Inc*., 310 NLRB at 1319 ("[u]nion's counterproposal on this date, containing a number of concessions, was a sign that the [u]nion was willing to modify its proposals. Given this movement by the [u]nion, the [employer] was not justified in concluding that negotiations were at impasse simply because the [u]nion's concessions were not more comprehensive or sufficiently generous"). While Respondent clearly lost patience with the Union, that frustration does not equate with a valid impasse, nor did it mean that a negotiated agreement was out of reach. *Newcor Bay City Division*, 345 NLRB 1229, 1238-1239 (2005); and *Grinnell Fire Protection Systems Co*., 328 NLRB 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 534 U.S. 818 (2001). See also *Powell Electrical Mfg. Co*., 287 NLRB 969, 973 and 974 (1987), enfd. as modified 906 F.2d 1007 (5th Cir. 1990) (futility, not some lesser level of frustration, discouragement, or apparent gamesmanship, is necessary to establish impasse). Where a party who has made significant concessions indicates a willingness to compromise further, it would be erroneous "to find impasse merely because the party is unwilling to capitulate immediately and settle on the other party's unchanged terms... Further, even assuming arguendo that [the employer] has demonstrated it was unwilling to compromise any further, we find that it has fallen short of demonstrating that [the union] was unwilling to do so." *Grinnell Fire Protection Systems Co*., supra at 586 (1999).[36]

Additionally, a valid impasse cannot be reached when the employer has failed to supply the union with requested information relevant to the core issues separating the parties. *Caldwell Manufacturing Co*., 346 NLRB 1159, 1159-1160, 1170 (2006); see also *Colorado Symphony Association*, 366 NLRB No. 122, slip op. at 34 (2018); *Centinela Hospital Medical Center*, 363 NLRB No. 44, slip op. at 2-3 & fn. 8 (2015); *E.I. Du Pont Co*., 346 NLRB 553, 558 (2006); and *Titan Tire Corp*., 333 NLRB 1156, 1159 (2001). As stated, Respondent failed to provide the Union with the requested employee complaints about voice recording, which it listed as one of the reasons why it wanted to restrict access to the cafeteria.

Next, while Respondent identified limiting access to the cafeteria as one of its objectives, it never identified that as its primary or overriding objective. Nor did it indicate there was any exigency for limiting such access. During bargaining, Respondent gave the Union 10 reasons why it wanted to change the access policy, and only three dealt with access to the cafeteria (i.e., managers were inhibited from going into the cafeteria (because of the Union's unfair labor practice charge), non-union employees were having their meal breaks interrupted by Union staff, and Union members were unwillingly spoken to by Union representatives). The Union's counterproposal addressed two of these concerns, in part, by agreeing not to 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. Again, while the counterproposal may not have been to Respondent's complete satisfaction, it reflected substantial movement and brought the parties closer to an agreement.

Respondent cites to *National Gypsum Co.*, 359 NLRB 1058 (2013), as being analogous. I disagree. In that case, the Board found no violation when the employer unilaterally implemented changes to its health insurance premiums and safety rules following an impasse over the employer's proposals to replace its defined benefit pension plan with a defined contribution plan and to allow the employer to unilaterally suspend matching contributions to employee 401(k) accounts. In finding that impasse had occurred, the Board stated that the employer "had steadfastly

[36] In its November 21, 2017 letter, Respondent threatened to implement its revised access policy unless the parties reached an agreement by the end of the year. In its January 5, 2018 letter, however, Respondent expressed no willingness to continue bargaining over access; it declared impasse and set the timeline for implementation.

held to its two proposals and made clear that it was unwilling to accept concessions on other issues in return for dropping them, and the union, in turn, made it clear that it would not accept the two proposals...." The union said it did not believe the parties were at impasse, and that it was ready to continue bargaining. The Board, however, found it was clear the union had no intention of modifying its position on the issues "critical to the reaching of an agreement." Here, the Union never indicated it was unwilling to modify its position on access. On the contrary, it stated from the outset that it would consider limits on access in exchange for concessions on other issues, like wages and health care, which is why it was, unsuccessfully, attempting to bargain to an overall agreement.

Finally, the purported impasse over access did not lead to a breakdown in the overall negotiations. The Union eagerly sought to bargain all the key issues, including making concessions in order to reach agreement on those issues. Respondent summarily rejected them even though they moved the parties closer to an agreement. See *Newcor Bay City Division*, supra at 1238 (employer required to continue bargaining even when "a wide gap between the parties remains because under such circumstances there is reason to believe that further bargaining might produce additional movement") (internal quotes omitted). But when negotiations are stymied by a party prematurely declaring impasse, it prevents both parties from realizing this essential benefit of collective bargaining firmly rooted in the Act. See *Television Artists v. NLRB*, 395 F.2d at 628 ("[i]t is indeed a fundamental tenet of the [A]ct that even parties who seem to be in implacable conflict may, b[y] meeting and discussion, forge first small links and then strong bonds of agreement").

By prematurely declaring impasse and implementing the revised access policy, the Respondent failed and refused to bargain in good faith with the Union, in violation of Section 8(a)(5) and (1).[37]

G. Contacting the Anchorage Police Department to Report Trespassing by Union Representatives

Paragraph 6(c) of the final amended consolidated complaint alleges that on about January 31, 2018, Respondent violated Section 8(a)(5) and (1) of the Act when it restricted Union access to the hotel by calling the Anchorage Police Department and reporting that Union officials were trespassing on hotel property when they did not comply with Respondent's revised access policy.[38] The General Counsel argues that just as Respondent's unilateral implementation of the revised access policy was unlawful, so was contacting the local police to seek its assistance in enforcing that policy. I agree. As there was no good faith impasse, the Union representatives retained their right under Article IV to access the employee cafeteria, and they were exercising that right on the day in question. It is a violation of Section 8(a)(5) and (1) for an employer to contact the police and seek the removal of union representatives for alleged trespass when they are acting pursuant to a contractual right. *Toms Ford, Inc.*, 253 NLRB 888, 893 (1990).

Respondent cites to *UPMC Presbyterian Hospital*, 368 NLRB No. 2 (2019), *Bexar County Performing Arts Center Foundation*, 368 NLRB No. 46 (2019), and *Kroger Limited Partnership*, 368 NLRB No. 64 (2019), for support. These cases are distinguishable because none involved union representatives exercising a contractual right to access the employer's property. In *Fred Meyer Stores, Inc.*, supra, the union had a contractual right to access the employer's property, but it significantly departed from its past practice in exercising that right; therefore, the Board found no violation. Again, here, the Union did nothing out of the ordinary when it sent two representatives to the employee cafeteria to meet with employees at the same time of day that it had for the last seven years.

Respondent, therefore, violated Section 8(a)(5) and (1), as alleged, by contacting the Anchorage Police Department to assist in enforcing the revised access policy to bar Union representatives from exercising their contractual right.

H. Bypassing the Union, Direct Dealing and Denigrating the Union

Paragraph 7 of the final amended consolidated complaint alleges that from February[39] through December 2018, Respondent violated Section 8(a)(5) and (1) of the Act when it bypassed the Union, dealt directly with its employees in the Unit, and denigrated the Union by posting a notice to employees by the time clock outside of the human resources office at the facility stating that: (a) it wanted "to have a direct working relationship with our employees to solve issues and does not believe having a 3rd party labor union involved is necessary;" (b) the Union was wrong that without a union employees could lose benefits; (c) at its hotels without unions employees had the same benefits the Unit employees currently had "and more;" and (d) "our managers welcome you to come to us with any concerns you may have for solutions that are satisfactory to you." Respondent defends that its comments were protected under Section 8(c) of the Act.

The General Counsel argues that Respondent bypassed the Union and engaged in direct dealing by soliciting employee concerns and impliedly promising to remedy them. Such conduct violates Section 8(a)(5) and (1). See *American Standard Cos.*, 352 NLRB 644, 655 (2008) (violation of Section 8(a)(5) where employer solicits employee grievances and promises to remedy them, thereby undermining the union); and *Laidlaw Transit*, 318 NLRB 695, 701 (1995)(violation of Section 8(a)(5) for supervisor to solicit employee grievances and attempt to deal directly

[37] Based on my findings that the prior impasse was broken with the Union's December 20 proposals, and Respondent thereafter violated Section 8(a)(5) and (1) when it failed and refused to bargain by prematurely declaring impasse over Union access and unilaterally implementing its revised access policy, it is unnecessary for me to evaluate whether Respondent also violated Section 8(a)(5) and (1) by failing to make counterproposals, ceasing negotiations, and refusing future bargaining, as those findings and conclusions would not materially alter the remedy.

[38] In brief, the General Counsel argues that by contacting the police Respondent restricted lawful union activity, in violation of Section 8(a)(1). I need not reach this separate contention because a violation of Section 8(a)(5) is also a derivative violation of Section 8(a)(1). *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

[39] Although the complaint alleges from February through December 2018, the parties stipulated that Respondent began posting the notice at issue in late June 2018. (Jt. Exh. 1, pg. 4).

with employees regarding a subject that was being discussed during bargaining with the union).

To establish a direct dealing violation, the General Counsel must show that: (1) the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000) (citing *Southern California Gas Co*., 316 NLRB 979 (1995)). Respondent's posting of the notice by the employee timeclock without notifying the Union satisfies the first and third factors. As for the remaining factor---the purpose---Respondent contends it was correcting misrepresentations or false statements contained in the Union's letter. That does not explain Respondent's statements of wanting a "direct working relationship with our employees to solve issues" without the need for a union, and welcoming employees to come to it "with any concerns you may have for solutions that are satisfactory to you." These statements establish that Respondent was seeking direct communication with employees about individual concerns related to their terms and conditions of employment, at the exclusion of the Union, with the implied promise of remedying those concerns to the employees' satisfaction.[40] Inviting employees to come directly to management for satisfactory solutions to their concerns undercuts the Union's role as the employees' bargaining representative, particularly at a time when it is attempting to negotiate a new agreement.[41]

The General Counsel next contends Respondent disparaged the Union with its characterizations of the contents of the Union's letter, including the statements set forth above. Under Section 8(c), an employer may criticize, disparage, or denigrate a union without running afoul of the Act, provided that its expression of opinion does not threaten reprisals, promise benefits, or otherwise interfere with the Section 7 rights of employees. See *Southern Bakeries, LLC*, 364 NLRB No. 64, slip op. at 3 (2016), enf. granted and denied in part on other grounds 871 F.3d 811 (8th Cir. 2017); *Children's Center for Behavioral Development*, 347 NLRB 35, 35 (2006). Here, by inviting employees to raise concerns directly with management and impliedly promising to remedy those concerns to the employees' satisfaction while negotiations were ongoing, Respondent undermined the status of the Union in the eyes of the employees and undercut its role as the employees' exclusive collective-bargaining representative.

I, therefore, find Respondent violated Section 8(a)(5) and (1) when it bypassed the Union and engaged in direct dealing by soliciting employee complaints with the implied promise of remedying them, and by denigrating the Union by undercutting its role as the exclusive bargaining representative.

Conclusions of Law

1. Respondent CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union UNITE HERE! Local 878 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has been the recognized exclusive collective-bargaining representative of the following unit of employees:

> All full-time and part-time banquet bartenders, banquet captains, banquet servers, banquet housemen, baristas, bellmen, bell captains, bruins bartenders, bus persons, cashiers, coat check/room check attendants, cocktail servers, concierges, cooks, dishwashers/stewards, doormen, front desk/PBX employees, hosts/hostesses, housekeeping clerks, housekeepers/room attendants, housemen, housekeeping inspectors, laundry presser/chute employees, laundry washers, maintenance employees, maintenance supervisors, night auditors, purchasing employees, restaurant servers, and room service employees employed at the facility located at 500 West 3rd Avenue, Anchorage, Alaska.

4. Respondent violated Section 8(a)(5) and (1) of the Act since about July 2017, when it unilaterally restricted the Union's access to its facility by barring interns.

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.

6. Respondent violated Section 8(a)(5) and (1) of the Act on around January 31, 2018, when it unilaterally restricted the Union's access to its facility by calling the Anchorage Police Department and reporting that Union officials were trespassing when they did not comply with Respondent's revised access policy.

7. Respondent violated Section 8(a)(5) and (1) of the Act from January 3, 2017 to about June 2, 2017, when it failed to timely provide the Union with the schedules, time cards, and payroll records for bussers at the Hooper Bay restaurant from November 1, 2016 to January 3, 2017.

8. Respondent violated Section 8(a)(5) and (1) of the Act from

[40] In brief, the General Counsel argues that by soliciting grievances and impliedly promising to remedy them Respondent independently violated Section 8(a)(1). As stated, I need not reach this separate contention because a violation of Section 8(a)(5) is also a derivative violation of Section 8(a)(1).

[41] The Board has held a violation may be found even if the employer does not specifically commit to granting a particular improvement in wages or benefits, so long as the totality of the circumstances indicate a willingness to address employee dissatisfaction without union representation. *Multi-Ad Service*, Inc., 331 NLRB 1226, 1227, 1241 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). However, "[a]n employer may rebut the inference of an implied promise by, for example, establishing that it had a past practice of soliciting grievances in a like manner prior to the critical period, or by clearly establishing that the statements at issue were not promises." *MEK Arden, LLC*, 356 NLRB No. 109, slip op. at 2 (2017) (quoting *Mandalay Bay Resort & Casino*, 355 NLRB 529, 529 (2010)). At the hearing, Respondent introduced a copy of its Open Door Policy, which was posted somewhere on the bulletin board prior to and during the posting at issue. The Open Door Policy invites employees to report situations or problems to their supervisor or another member of management and to give him/her an opportunity "to work it out" with the employee. But, unlike the posting, the Open Door Policy does not promise a solution that is satisfactory to the employee. Regardless, based on this limited evidence, I find Respondent did not rebut the inference of an implied promise of remedying employees' concerns with the cited statements in its posting responding to the Union's letter.

about August 22, 2017 to March 20, 2019, when it failed to timely provide the Union with the requested names of employees who complained that the Union was forcing them to agree to voice recording.

9. Respondent violated Section 8(a)(5) and (1) of the Act from late June through December 2018, when it bypassed the Union and dealt directly with unit employees by soliciting their grievances and impliedly promising to remedy them, and by denigrating the Union, by posting a notice to employees by the timeclock outside of the human resources office.

10. The above violations are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

11. Consistent with this decision, I dismiss the remaining Section 8(a)(1), (4) and (5) allegations.

ORDER[42]

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

1. Cease and desist from:

(a) Failing or refusing to bargain in good faith with UNITE HERE! Local 878 as the recognized exclusive collective-bargaining representative of:

> All full-time and part-time banquet bartenders, banquet captains, banquet servers, banquet housemen, baristas, bellmen, bell captains, bruins bartenders, bus persons, cashiers, coat check/room check attendants, cocktail servers, concierges, cooks, dishwashers/stewards, doormen, front desk/PBX employees, hosts/hostesses, housekeeping clerks, housekeepers/room attendants, housemen, housekeeping inspectors, laundry presser/chute employees, laundry washers, maintenance employees, maintenance supervisors, night auditors, purchasing employees, restaurant servers, and room service employees employed at the facility located at 500 West 3rd Avenue, Anchorage, Alaska.

(b) Unilaterally implementing changes affecting employees' wages, hours, or other terms and conditions of employment without providing the Union with prior notice and an opportunity to bargain over those changes, such as Union access.

(c) Failing to timely provide the Union with requested information that is relevant and necessary to its role as collective-bargaining representative of the unit employees.

(d) Prematurely declaring impasse and unilaterally implementing its revised Union access policy.

(e) Bypassing the Union and directly dealing with unit employees by soliciting their grievances and impliedly promising to remedy them.

(f) Denigrate or undercut the Union's role as the exclusive bargaining representative by soliciting the unit employees' grievances and impliedly promising to remedy them.

(g) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

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

(a) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees before implementing any changes to their wages, hours, or other terms and conditions of employment.

(b) On request, rescind the unilateral changes made regarding the Union's access to the hotel property and notify the Union in writing that has been done.

(c) On request, 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.

(d) Within 14 days after service by the Region, post at its Anchorage, Alaska facility copies of the attached notice marked "Appendix."[43] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, those notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., March 4, 2020.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail or refuse to bargain in good faith with the

[42] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

UNITE HERE! Local 878 (the Union), as the exclusive collective-bargaining representative of all full-time and part-time banquet bartenders, banquet captains, banquet servers, banquet housemen, baristas, bellmen, bell captains, bruins bartenders, bus persons, cashiers, coat check/room check attendants, cocktail servers, concierges, cooks, dishwashers/stewards, doormen, front desk/PBX employees, hosts/hostesses, housekeeping clerks, housekeepers/room attendants, housemen, housekeeping inspectors, laundry presser/chute employees, laundry washers, maintenance employees, maintenance supervisors, night auditors, purchasing employees, restaurant servers, and room service employees employed at the facility located at 500 West 3rd Avenue, Anchorage, Alaska.

WE WILL NOT fail or refuse to timely provide the Union with presumptively relevant information.

WE WILL NOT unilaterally make changes regarding Union access to hotel property, including the Union's interns, without providing the Union with notice and an opportunity to bargain.

WE WILL NOT contact the police to have Union representatives removed from the hotel property when they are acting in accordance with their contractual right.

WE WILL NOT fail or refuse to bargain in good faith by prematurely declaring impasse and unilaterally implementing changes to employees' wages, hours, or other terms and conditions of employment.

WE WILL NOT bypass the Union and deal directly with unit employees by soliciting their grievances and impliedly promising to remedy them.

WE WILL NOT denigrate or undercut the Union's role as the exclusive bargaining representative by soliciting the unit employees' grievances and impliedly promising to remedy them.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL, upon request, bargain in good faith with the Union as the exclusive collective bargaining representative of our unit employees with respect to the employees' wages, hours, and other terms and conditions of employment.

WE WILL, upon request, bargain in good faith with the Union until a full agreement or good faith impasse is reached.

WE WILL, upon request, rescind unilateral changes made to the Union access policy and notify the Union in writing this has been done.

WE WILL, upon request, rescind unilateral changes made to the Union interns' ability to access hotel property.

WE WILL deal exclusively with the Union concerning the employees' wages, hours, and other terms and conditions of employment.

WE HAVE removed the notice posted on the bulletin board by the employee timeclock responding to the Union's letter in which we bypassed the Union and dealt directly with unit employees by soliciting their grievances and impliedly promising to remedy them.

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

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

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-193656 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.