The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) of the Act by unlawfully declaring impasse and implementing its last, best, and final offer. We conclude that the parties were not at valid impasse when the Employer made its declaration and that the Employer violated Section 8(a)(5) by prematurely declaring impasse and implementing its last, best, and final offer. Accordingly, the Region should issue complaint, absent settlement.

**FACTS**

Jonathan Club (“the Employer”) is a members-only club in downtown Los Angeles. UNITE HERE Local 11 (“the Union”) represents approximately 150 housekeeping and food service employees at the Club. The Employer and the Union had a collective-bargaining agreement (“CBA”) spanning May 1, 2010, to April 30, 2014, and share a long bargaining history predating that agreement. On February 28, 2014, both parties agreed to extend the CBA until May 30, 2014. After this date, the CBA continued on a month-to-month basis, terminable upon ten-day written notice from either party.

The parties began bargaining over a new CBA in May 2014 and met fourteen times over twenty-four months. The primary issue of contention was wages. The Employer sought to eliminate service-charge pay for Food & Beverage Department (“Department”) employees and to transition to flat-rate pay. The Union sought to increase the percentage of the service-charge that would be retained by employees. The meetings and communications between the parties are summarized below.
The parties first met on May 13, 2014. The Union made a written proposal noting that the Employer currently charged its members a 22% food and beverage service charge, of which it kept 7% for itself and divided the remaining 15% among servers (11%), captains (2%), and bussers (2%). The Union proposed that servers receive 12% rather than 11% and that the Employer give the 7% it retains for itself to Department employees in proportions to be determined in future bargaining. It also requested a breakdown of service-charge payments for particular events. The Employer gave a speech about its poor financial condition and said that it wanted to eliminate service-charge pay for employees and was considering discontinuing contributions to the employee pension plan.

On June 19, 2014, the Employer made a written proposal and claimed that its proposed changes were necessary because the Employer had lost $ on food services in the past year. The Employer proposed that bartenders, bussers, captains, and servers be paid an increased flat rate rather than sharing the service charge. The Employer also proposed switching the Union’s healthcare plan from Kaiser to Aetna. The parties discussed their respective proposals again on August, 13, 2014.

On October 3, 2014, the Union made another written proposal, reiterating that employees should get to keep the entire 22% service charge rather than the 15% they currently received. The Employer in turn maintained its position on the elimination of the service charge. However, it proposed higher hourly wages—doubling or tripling the hourly wages of certain Department employees—and future wage increases. At this meeting, the Union agreed to the Employer’s proposal to bring in a federal mediator.

The parties next met on November 14, 2014, with the mediator present. The Union proposed annual wage increases for current flat-rate employees from $1.00– per hour. It also proposed annual wage increases from $.35– per hour for service-charge employees, adding that “rates can and will be adjusted based on the increase in Service Charge being retained by the tipped employees” after the Employer gives up its share.

On November 18, 2014, the Employer offered a $ across-the-board increase in hourly wages over its October 3 proposal. In addition to accepting the Union’s proposal for a five-, rather than four-, year CBA, the Employer proposed raising future hourly wage increases by an additional $ with all employees earning an additional $. per hour in years three, four, and five of the CBA. The Employer accepted the Union’s pension-plan proposal for years one through three and its proposal that night cleaners receive the same commission as housekeepers. The Employer also agreed to increase the night cleaner/housekeeper commission pool from 5% to % and agreed to give priority to dishwashers over agency employees for A.M. schedules. The Union in turn proposed that the Employer give employees % of the
7% of the service charge it currently retains in the first year, and on September 1, 2015.

On February 4, 2015, the Employer made a comprehensive package proposal, including additional $ per-hour increases in flat-rate pay. The Union demanded that the Employer give its 7% of the service charge to all employees, not just Department employees. The Employer agreed to the Union’s proposal to increase the pay of housekeepers for handling sofa beds, cribs, and rollaway beds from $1.50 to $ upon ratification of the CBA, and then to $ per item on September 1, 2015, and $ on September 1, 2016. The parties also reached agreement on a Union proposal regarding scheduling and time off for housemen.

On February 19, 2015, the Union proposed a decrease in the hourly flat wage for tipped captains contingent on the whole 22% service charge being retained by all employees. The Employer rejected this proposal. It also rejected proposed changes in the grievance procedure that would give the Employer less time to respond and the Union more time to investigate and respond, as well as a proposal that all employees would have scheduling preference over agency workers. A few days later, the Union requested information regarding service-charge payments by category of employee and the percentage taken by the Employer.

On March 11, 2015, the Employer made a presentation about its finances. It proposed another flat-rate pay increase of $ per hour and improved future pay increases in year two for transitioning Department employees by $. The Union reiterated its information request.

On April 7, 2015, the Employer increased its proposed flat rate for bartenders and head bartenders by an additional $. It also proposed $ per-hour wage increases for transitioning Department employees in years one and two. It then agreed to the Union’s pension plan for years four and five of the CBA.

On June 3, 2015, the Employer presented its last, best, and final offer (“LBFO”), and stated that it wanted employees to vote on it. The Union said that the LBFO was premature and that it still needed requested information. In the LBFO, the Employer again increased its proposed wages and future wage increases, while continuing to insist on eliminating service-charge pay for all employees. The Employer withdrew its proposal to change health care coverage to Aetna and agreed to maintain employees on the Kaiser plan, as proposed by the Union.

On August 14, 2015, the Union put the Employer’s LBFO to a vote. Of the 101 employees who voted, 93 voted against the offer and 8 voted in favor of it. After the vote, the Union notified the Employer of the result and requested to return to the bargaining table. The Employer agreed to meet again and agreed to the Union’s demand that an auditor review the Employer’s finances.
On October 28, 2015, the parties met for seven minutes. The Union stated that its auditor was having difficulty getting information necessary to review the Employer’s finances. The Employer said that it provided everything the auditor requested. The Union made a detailed information request about all 2014–2015 banquet event orders (BEOs) and the use of temporary employees. It also made a modified written proposal for changes in the grievance procedure, seniority and work opportunity policies, and participation in the Union’s training program for hospitality industry employees.

On December 16, 2015, the Employer presented a revised LBFO, proposing hourly wages that were higher than those proposed in its most recent offer and more than tripling hourly wages for certain categories of Department employees.

By this point, the parties had reached tentative agreement on a number of issues, including: the length of the CBA; employee pension, health, and welfare benefits; housekeeping room credits; commission for housekeepers and night cleaners; and the Union’s housemen proposal. The unresolved issues were: the elimination of the service charge; wages; the Union’s proposed grievance language; the Union’s proposal regarding work opportunity for regular employees over agency employees; and the Union’s hospitality industry employees training proposal.

On December 21, 2015, the Union went to the Club to review the information it requested. It spent 1.5 hours reviewing the information but could not retrieve the information it wanted because “the Club . . . didn’t organize the information . . . .” That same day, the Employer requested by letter that the Union put the December 16 LBFO to a vote and notify it of the results by January 11, 2016. If the offer was not ratified, the Employer would implement its LBFO on January 25, 2016. The letter also stated that “several times during negotiations, [Union negotiators] … repeated that this ‘was never going to happen’, ‘not over my dead body,’” and stated that “[w]ith respect to your information requests, we have responded to them all and have made all the requested documents available for the Union’s inspection and review.”

On December 24, 2015, the Union stated that it would provide further proposals after the holidays and that it expected the Employer to do the same. It denied that it had said that the transition to the flat-rate pay system was “never going to happen” or “over my dead body,” and added that during its audit, “[i]t was impossible for us to even get any sense of the Employer’s practice with regards to tip distribution.” The Union requested to meet again, provided dates, and suggested that it was preferable to meet before putting the LBFO up for a vote.

On December 29, 2015, the Union’s auditor returned to the Club to review the information and reported back to the Union two days later. According to the audit, the Employer made a net profit of over $\text{b(4)}$ in 2014 but Department losses were...
nearly $\text{(b)(4)}$. In 2015, the Employer’s net profit was more than $\text{(b)(4)}$ but Department losses again approached $\text{(b)(4)}$. While the Employer budgets for Department losses, non-budgeted losses from food services grew from $\text{(b)(4)}$ in 2014 to $\text{(b)(4)}$ in 2015. Regarding the Employer’s service-charge offset, the report stated that the flat-rate plan “represents an overall increase in earnings for the workers”; however, “[w]hile Employees in other departments would have received an increase averaging $\text{(b)(4)}$ per hour, on average, Employees in the Food and Beverage Department would receive a $\text{(b)(4)}$ decrease.” The auditor recommended that to offset the losses from the transition to a flat wage rate, “an additional $\text{(b)(4)}$ ($\text{(b)(4)}$ plus two $\text{(b)(4)}$ increases) should be added” to the wages proposed in the Employer’s second LBFO.

On January 8, 2016, the Employer sent a letter to the Union to schedule a meeting for January 19. On January 15, the Union replied that it could not meet on that date but could meet on later dates. It affirmed that it had not agreed to put LBFO up for a vote. The Union also said that it was having a hard time “making any sense of [BEOs] provided to us in December to review,” that gratuities were missing from some of the BEOs, and that it “needs this information in order to present a proposal about the wage structure for banquets.”

On January 22, 2016, by letter, the Employer said that “it would implement its last, best, final offer on January 25, “based upon the clear impasse in negotiations which the parties have reached.” The letter concludes by stating that “[The Union] requested a meeting, and we are of course willing to meet at your convenience.” The Union did not reply.

On February 12, 2016, Employer implemented its last, best, final offer. That day the Union sent a letter stating that it did not agree that the parties had reached impasse. It also stated that while it did not agree with the Employer’s proposal to eliminate the service charge and transition tipped employees to flat-pay rate, it remained open to further discussion and negotiations about employee pay structure. The Union requested further bargaining.

Both parties agreed to meet again on March 3, 2016; however, the Union cancelled the meeting. Then on May 10, 2016, the parties held another bargaining session. The Union proposed to maintain its $\text{(b)(4)}$ portion of the service charge, rather than the entire 22% as it had proposed throughout negotiations. The Employer did not make a counterproposal.

**ACTION**

We conclude that the parties were not at valid impasse when the Employer made its declaration. Therefore, the Employer violated Section 8(a)(5) when it prematurely declared impasse and unilaterally implemented its LBFO on February 12, 2016.
I. Relevant Board Law

An employer violates its duty to bargain if, when negotiations are in progress, it unilaterally implements changes in terms and conditions of employment. The Board considers negotiations to be in progress, and thus will find no genuine impasse to exist, until the parties are warranted in assuming that further bargaining would be futile or that there is "no realistic possibility that continuation of discussion . . . would [be] fruitful."  

The Board does not lightly infer the existence of an impasse, and the burden of proving it rests on the party asserting it. The existence of impasse is a factual determination that depends on a variety of factors, including the contemporaneous understanding of the parties as to the state of negotiations, the good faith of the parties, the importance of the disputed issues, the parties' bargaining history, and the length of their negotiations. The Board also considers the parties' demonstrated flexibility and willingness to compromise in an effort to reach agreement, and whether they continued to meet and negotiate. In short, the Board requires that both parties believe that they are "at the end of their rope." So long as "there has

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4 Taft Broadcasting Co., 163 NLRB at 478.


7 Saint-Gobain Abrasives Inc., 343 NLRB at 556 (quoting PRC Recording Co., 280 NLRB 615, 635 (1986)); Grinnell Fire Systems, Inc., 328 NLRB 585, 585 (1999) and
been movement sufficient ‘to open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions,’” the Board will not find impasse.8

The Board has recognized that a bargaining stance where both sides maintain hard positions on some issues, and each indicates to the other that it is standing firm, is the rule in bargaining and not the exception.9 Furthermore, the Board does not confine its examination of bargaining history solely to the item claimed to be at impasse.10 Rather, 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 stalled ones; "bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas."11

II. Consideration of Impasse Factors in the Instant Case

A. Contemporaneous Understanding of the Parties

A statement by one party that it believes continued negotiations will be helpful, or a substantial concession at the bargaining table, often indicates both that the party is willing to compromise and that further discussion may be fruitful.12 Conversely, an employer’s mere declaration that the parties are at impasse does not establish that

8 Hayward Dodge, 292 NLRB 434, 468 (quoting NLRB v. Webb Furniture Corp., 366 F.2d 314, 316 (4th Cir. 1966)).

9 See PRC Recording Co., 280 NLRB at 635.


11 Korn Ind. v. NLRB, 389 F.2d 117, 121 (4th Cir. 1967), enforcing 161 NLRB 866 (1966); see also, e.g., Sacramento Union, 291 NLRB at 556–57.

12 See Old Man’s Home of Philadelphia, 265 NLRB 1632, 1634 (1982) (finding that union concessions were substantial enough to reasonably suggest that further concessions might be forthcoming), enforcement denied sub nom. Saunders House v. NLRB, 719 F.2d 683, 688 (3d Cir. 1983).
the parties are in fact deadlocked, particularly where there has been a recent concession or the union remains willing to bargain.

Here, the evidence shows that the parties did not both think that further negotiations would be futile when the Employer declared impasse and implemented its LBFO. After the Union had the necessary information to make a knowledgeable counteroffer, it adjusted its bargaining position by no longer demanding that the Employer give the entire 22% service charge to its employees and agreed that the Employer would continue to keep 7% for itself. Moreover, the Union disagreed that the parties were at impasse and requested additional bargaining when the Employer implemented its LBFO, and the parties did in fact meet for a subsequent bargaining session. Hence, the Union was beginning to move on the impasse issue, and its concrete proposal is evidence of the Union’s flexibility, suggesting that further negotiations would not have been fruitless.

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13 See Wycoff Steel, 303 NLRB 517, 523 (1991) (“[A] party's declaration that an impasse has occurred will not be dispositive in determining whether one does indeed exist—all of the circumstances of the case must be analyzed.”) (citing Huck Mfg. Co v. NLRB, 693 F.2d 1176 (5th Cir. 1982); Teamsters Local 175 v. NLRB, 788 F.2d 27 (D.C. Cir. 1986)); see also PRC Recording Co., 280 NLRB at 639–40.

14 See, e.g., Cotter & Co., 331 NLRB at 788 (two days after employer declared and union denied impasse, union’s negotiators asked to meet and continue bargaining, indicating that the union “realistically believed that further negotiations might produce an agreement”); Colfor, Inc., 282 NLRB 1173, 1174 (1987) (agreement to meet further indication that no impasse had been reached), enforced, 838 F.2d 164, 167 (6th Cir. 1988).

15 See Laurel Bay Health & Rehab. Ctr., 353 NLRB 232, 233 (2008) (finding no impasse where the employer failed to test the union's willingness to compromise despite the fact that “parties had agreed to meet again, . . . the Union would be preparing counterproposals, and . . . there was at least professed flexibility on health insurance alternatives”), enforcement denied, 666 F.3d 1365 (D.C. Cir. 2012); Newcor Bay City Division, 345 NLRB 1229, 1238 (2005) (employer failed to establish impasse where “[t]he Union's concessions demonstrated a willingness to make sacrifices in the interest of arriving at a new agreement, and were presented only two meetings before the one at which the Respondent declared impasse . . . .” providing a “clear indication of the Union's flexibility on significant issues”). Cf. California Pacific Medical Center, 356 NLRB 1283, 1288–89 (2011) (finding that the union’s “mere assertions of flexibility, unaccompanied by further concrete proposals,” were signals that it expected the employer to compromise, not that the union had anything to offer to break the impasse).
B. Importance of the Disputed Issue

The Board has found an issue to be important when it pervades the negotiations and “all other bargaining occur[s] in the shadow of this fundamental disagreement.”\(^\text{16}\) This is demonstrated by the parties’ bargaining behavior and express statements: if the parties never waiver from their original positions, or if they state that the issue is fundamental to them and they cannot compromise on it, then this will support a finding of importance.\(^\text{17}\) In the instant case, the elimination of service-charge pay was clearly important to both parties. From the beginning, the Employer communicated through presentations and express statements that it was determined to end service-charge pay to staunch losses in the Department. Its bargaining behavior also indicates that while it was flexible on flat-rate wages, it was unyielding on the elimination of the service charge. And the Union’s bargaining behavior—particularly its refusal to make counterproposals—shows that it was steadfast in its opposition to the elimination of the service charge.

However, the Union may have ultimately agreed to a flat rate increase that, according to its auditor’s recent report, would yield an increase over, or at least an equivalency to, the service-charge compensation that Department employees had been receiving. The Union informed the Employer that it wished to continue negotiations and planned to present a new proposal prior to the Employer’s implementation of its LBFO. The Union also communicated that it was having a difficult time gathering the information it needed to put forth a proposal “about the wage structure for banquets,” indicating that it was at least contemplating a revised proposal on banquet compensation once it had the necessary information. And the Employer had increased the wages it proposed in lieu of service charge pay in every set of proposals, including the LBFO, showing continued movement on the disputed issue right up to the time when it declared impasse. It is also possible that the Employer would have moved off its position on eliminating service-charge compensation if the bargaining process were allowed to play out. The Employer provided no reason why it needed to move to a flat rate, other than the cost savings that would entail,\(^\text{18}\) and purely economic issues like

\(^{16}\text{CalMat Co., 331 NLRB 1084, 1098 (2000).}\)

\(^{17}\text{Id.}\)

\(^{18}\text{The Employer has asserted that it is no longer collecting the service charge from customers, which could indicate that its position was based on resistance to the service charge from customers. But despite being given the opportunity, it has not as of yet established that it has stopped collecting the charge from customers (and at least some of the order forms it has used post-implementation continue to include that fee). In any event, it did not make the assertion during bargaining that it needed to}
this are often resolved by the other party making concessions in some other economic area.

Moreover, only where the Board finds an impasse in the overall negotiations is the employer free to implement its last, best and final offer. The parties still had several other important terms to negotiate, including the grievance procedure and the Employer’s use of agency employees to perform bargaining unit work. Hence, we conclude that, although the parties had strong positions on the service-charge issue, and that issue was of great importance to both sides, the state of bargaining on that issue, and other issues, did not support the Employer’s declaration of impasse.

C. Good Faith of the Parties in Negotiations

The Board analyzes the parties’ conduct both at and away from the bargaining table, using a totality of circumstances approach, to determine whether good-faith bargaining has occurred. The parties must bargain with a “sincere purpose to find a basis of agreement”; however, “an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith.” If the employer is proactive in starting negotiations, makes itself available to and accommodates the union, explains its proposals, and makes modifications and concessions during bargaining, these considerations weigh in favor of finding good faith. Here, the evidence suggests that, under the totality of the circumstances, the parties were engaged in good faith

eliminate the charge in order to assuage customer concerns, so our analysis would remain the same.

19 Sacramento Union, 291 NLRB at 554.

20 See, e.g., Public Service Co. of Oklahoma (PSO), 334 NLRB 487, 487 (2001), enforced, 318 F.3d 1173 (10th Cir. 2003).

21 CalMat, 331 NLRB at 1099 (quoting Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984)); see also Mid-Continent Concrete, 336 NLRB 258, 259 (2001) (“[M]ere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act.”), enforced sub nom. NLRB v. Hardesty Co., 308 F.3d 859 (8th Cir. 2002); Atlanta Hilton & Tower, 271 NLRB at 1603 (employer “is obliged to make some reasonable effort in some direction to compose his differences with the union, if 8(a)(5) is to be read as imposing any substantial obligation at all”) (quoting NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 135 (1st Cir. 1953)).

bargaining. They met regularly and exchanged and discussed contract proposals in an effort to reach agreement. The Employer was diligent in scheduling and conducting meetings and explaining its proposals, and it accommodated the Union’s schedule. The Employer’s opening proposal doubled or tripled the hourly wages of Department employees and it offered successively higher hourly wages with each subsequent proposal, even as it remained steadfast on eliminating the service charge. Accordingly, we conclude that the parties bargained in good faith.

D. Bargaining History and Length of Negotiations

The parties have a well-established bargaining history, which cuts at least slightly in favor of impasse. As to the length of negotiations, the Board indicates that the more meetings there have been, the more likely that an impasse can be found. Here, the parties held 14 meetings over a 24-month period. However, the fact that 14 meetings occurred before impasse was declared does not itself suggest that the parties were likely to have been at impasse. Significantly, the parties met only once after the Union auditor was able to examine the Employer’s books and report its findings to the Union. Crediting the Union’s claim that it was unable to assess the impact of the Employer’s LBFO based on information provided in earlier information requests, this means that the parties met only once after the time when

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23 We note, however, that although bargaining history is listed in Taft Broadcasting as one of the factors to consider in making an impasse determination, it has been treated as the least determinative of the Taft factors. In Taft Broadcasting itself, the Board gave no indication of how the factor was to be applied or what significance it should be given.163 NLRB at 478; see also Taylor-Winfield Corp., 225 NLRB 457, 461 (1976) (even though no previous bargaining history between the employer and the newly certified union, Board concluded that impasse existed based on an evaluation of other Taft factors).

24 Compare Seattle-First National Bank, 267 NLRB 897, 898 (1983) (weighing a bargaining history spanning ten years and two previous CBAs in favor of lawful impasse), enforced sub nom. Fin. Inst. Employees of Am. v. NLRB, 738 F.2d 1038 (9th Cir. 1984), with Alsey Refractories Co., 215 NLRB 785, 786 (1974) (finding unlawful impasse where the parties were bargaining for the first time and “their efforts to achieve a contract should be afforded the fullest opportunity”).

25 See, e.g., Sacramento Union, 291 NLRB at 552 (finding that lawful impasse had not been reached where the parties met 17 times over 4 months); Caravelle Boat Co., 227 NLRB 1355, 1358 (1977) (even though the parties met 14 times, concluding that “[t]he number of bargaining sessions, a hiatus, and failure to reach agreement, without more, do not indicate that an impasse has been reached”).
the Union was in a position to make an informed counterproposal. Hence, while negotiations had been ongoing for a long time, meaningful negotiations over the impasse issue had begun only after the Employer had declared impasse. This suggests that there was still an opportunity for the parties to negotiate an agreement through the collective bargaining process. For this reason, we do not find that the length of the parties’ negotiations weigh in favor of lawful impasse.

CONCLUSION

In sum, at the time the Employer declared impasse, the parties were still making some degree of progress in negotiations. Although they had strong opposing positions with regard to the critical service charge issue, they were not “at the end of their rope” on that issue and their positions on that issue did not prevent them from bargaining other issues or lead to a breakdown in overall negotiations. And when faced with the Employer’s declaration of impasse and unilateral implementation, the Union requested additional bargaining and presented new proposals, including a new proposal regarding the service charge. Under these circumstances, we conclude that when the Employer declared impasse, negotiations had not reached the point where there was “no realistic possibility” that continued bargaining would be fruitful.26

Accordingly, we conclude that the Employer’s declaration of impasse was premature and it was not privileged to implement its LBFO. The Region should issue complaint, absent settlement.

/s/
B.J.K.

26 *AFTRA v. NLRB*, 395 F.2d at 628.