Troutbrook Company, LLC d/b/a Brooklyn 181 Hospitality, LLC *and* New York Hotel and Motel Trades Council, AFL–CIO. Case 29–CA–275229

December 16, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND PROUTY

On December 1, 2021, Administrative Law Judge Lauren Esposito issued the attached decision, and on December 10, 2021, she issued an errata. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, the Charging Party filed limited cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

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 and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to bargain in good faith due to its refusal to discuss economic subjects of bargaining with the Union until all non-economic subjects were resolved. Further, we agree with the Charging Party that an extension of the certification year pursuant to *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), is warranted, and we amend the remedy accordingly.

Background

The relevant facts, fully set forth in the judge's decision, are as follows. In a prior proceeding, the Board found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union following the Union's certification as the exclusive representative of the unit in Case 29–RC–216327.[3] After the United States Court of Appeals for the District of Columbia Circuit enforced the Board's order requiring the Respondent to bargain with the Union,[4] the parties began negotiating an initial collective-bargaining agreement (CBA) for a unit of employees at the Respondent's Brooklyn, New York hotel. Prior to the parties' first bargaining session, Assistant General Counsel for the Union Gideon Martin sent the Respondent's negotiator, Raymond Pascucci, the Union's entire contract proposal, which consisted of the Union's Industry-Wide Agreement with the Hotel Association of New York City, Inc. (the IWA), modified by a Memorandum of Understanding (MOU) that tailored various provisions of the IWA to the Respondent's specific operational needs. The Union's proposal encompassed all economic and non-economic subjects. As to economic subjects, the MOU included provisions addressing wages, health and pension benefits, vacation and other forms of paid leave, and the IWA contained additional economic provisions addressing subjects such as overtime, premium pay and shift differentials, holidays, severance pay, and a 401(k) plan.

At the first bargaining session on May 18, 2020, general counsel and executive vice president for the Union, Rich Maroko, reviewed the terms of the Union's contract proposal, and Pascucci stated that he needed time to fully review it. At the second bargaining session on June 4, Pascucci rejected the Union's proposal outright and proposed five ground rules for bargaining. One of the proposed ground rules was that the parties would focus on non-economic subjects before turning to economic subjects.[5] Maroko responded that the Union wanted to discuss the entire contract without limitations but suggested that Pascucci provide his proposed ground rules in writing for the Union's review. The session then turned to a discussion about the Union's contract proposal. Pascucci stated that the Union had proposed a lengthy contract with detailed provisions "written for the larger industry or hotel chains." Maroko responded that signatories to the IWA included both large hotel chains and small, independently owned

[1] 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.

[2] We shall modify the judge's recommended Order to conform to our amended remedy, to the Board's standard remedial language, and in accordance with our decision in *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022). We shall substitute a new notice to conform to the Order as modified.

[3] See *Troutbrook Co., LLC d/b/a Brooklyn 181 Hospitality, LLC*, 367 NLRB No. 139 (2019).

[4] See *Troutbrook Co., LLC v. NLRB*, 801 Fed.Appx. 781 (D.C. Cir. 2020).

[5] The Respondent's five proposed ground rules included that the parties agree to: (1) forego recording bargaining sessions, (2) focus on non-economic issues before moving on to economic issues, (3) make requests for information in writing and provide responses within a reasonable time frame, (4) present formal proposals in writing, and (5) acknowledge that no individual issue will be considered agreed-upon until the parties signed a tentative agreement on the issue.

hotels in Brooklyn. Maroko further stated that the IWA was a "mature document," containing provisions developed over many years to accommodate hotel owners and operators and hotel workers. Later, in response to Maroko's suggestion that the Respondent make a proposal, Pascucci stated that the Respondent's proposal "will not be the whole contract, just some of the articles in our contract and we'll state our counterproposal." Maroko responded that "[o]ur position is good faith requires a complete proposal . . . You should give a full proposal so we can assess the entirety of it." The session ended with Pascucci stating that he would send the Union the Respondent's proposed ground rules for review.

In a series of subsequent emails, Pascucci continued to insist on a ground rule that "[t]he parties will focus on non-economic subjects before turning to economic subjects." Pascucci also reiterated several "key points" he had made at the previous bargaining session. Pascucci stated that the Respondent was "*NOT* willing to accept the IWA" and that it intended to negotiate a "stand-alone CBA" appropriate for "a small business with a small workforce" under "severe financial strain." In an email dated June 5, Union Attorney Martin agreed to the Respondent's proposed ground rules concerning no recording of bargaining sessions and that responses to information requests would be provided within a reasonable timeframe but rejected the remaining proposals. In rejecting the ground rule about addressing non-economic subjects first, the Union stated that "we do not want to constrain the parties' capability to freely explore and discuss any items, such as specific proposals, terms, or conditions, during bargaining sessions."

In an email from Pascucci dated June 10, the Respondent proposed a modified version of the ground rule regarding addressing noneconomics first: "The parties agree to focus primarily on non-economic subjects before turning to economic subjects, but it is understood that this general framework does not preclude either party from raising and freely discussing any item at any point in the bargaining process." In an email dated June 15, Martin replied by expressing the Union's disappointment that the Respondent had not provided a response to the Union's complete contract proposal and asked when the Union could expect to receive it. In addressing the Respondent's modified proposed ground concerning negotiating noneconomics first, Martin stated:

> We have proposed a complete contract, covering both economic and non-economic terms. We want to be able to bargain over all such terms without artificial timeline or constraint. We do not believe you can preclude the parties from bringing up certain subjects. The Union rejects this proposed ground rule. Let us know if you are refusing to have meaningful discussion on economics until all non-economic subjects are addressed.

The Union confirmed its prior agreement with two of the Respondent's ground rules but rejected the remainder of the ground rules as modified in Pascucci's June 10 email. In an email dated June 18, Pascucci stated that the Respondent was "prepared to move forward without the[] additional proposed ground rules," but stated that it would proceed with negotiations in the following manner: "In responding to the Union's proposals, the [Respondent] will focus on non-economic subjects first."

At the next bargaining session on June 25, 2020, Pascucci briefly reviewed six non-economic proposals that the Respondent had just sent to the Union.[6] Martin stated that the Union did not agree to address solely non-economic issues and asked when the Union could expect to receive proposals on wages, health benefits, and retirement benefits. Pascucci replied, "[w]orking on non-economics first, that's our plan." Martin renewed the Union's request for a complete proposal and explained that bargaining unit employees had questions regarding wages, health benefits, and retirement that he needed to be able to address. Martin asked how many proposals the Respondent intended to make, and Pascucci stated that it intended to "work on these topics" until a tentative agreement was reached, and then continue to "the next set of proposals." The parties then proceeded to discuss the language in the Respondent's proposal in further detail. The session ended with Martin urging the Respondent to consider providing a complete proposal encompassing all mandatory subjects of bargaining.

There followed a 7-month hiatus in bargaining caused by the COVID-19 pandemic and its impact on the hotel industry. At each of the ensuing three bargaining sessions and in related correspondence between the parties, the Respondent adhered to its stated strategy of discussing non-economic subjects first. In the bargaining session on February 2, 2021, Martin stated that the Union had not received any additional response to the complete proposal the Union had made the previous year and was still awaiting a proposal from the Respondent that encompassed economic issues. Pascucci stated he intended to "first work through non[-]economics, get through a half dozen and resolve and then move on to next sets, and then eventually work through economics." Martin renewed the

[6] The Respondent's proposals included the following subjects: Preamble, Recognition, No Discrimination, No Strikes or Lockouts, New Employees (probationary period), Hours of Work, and Effective Dates of the CBA. The Respondent's bargaining notes describe these proposals as involving non-economic subjects.

Union's request for a complete proposal, stating that "piecemeal" bargaining was unproductive and did not satisfy the legal standards for bargaining in good faith. Martin also suggested that even if Pascucci intended to negotiate a completely new contract he could begin with the Union's proposal, but, as the judge found, Pascucci stated again that the Respondent was seeking easy, simple, concise language which provided a lot of flexibility. Martin reiterated that he was willing to bargain to establish the flexibility that would accommodate the Respondent's specific operational needs. Pascucci stated that the Respondent had provided counterproposals on several articles, and Martin stated again that it was not possible to engage in piecemeal bargaining, such as discussing the hours of work provisions without a wage proposal.

At the next bargaining session on March 11, 2021, Martin addressed the overall status of negotiations, stating that if the Respondent expressed a willingness to agree to the IWA with a MOU, he could "come up with as many deals and breaks" as possible to arrive at an overall agreement. Pascucci reiterated that the Respondent wanted to negotiate its own contract reflecting the fact that it is a small hotel in Brooklyn, stating that the future was "questionable." Martin responded that the Union was waiting for a proposal, and Pascucci stated again that the Respondent intended to bargain subsets of issues, moving onto a new group of topics after the previous group was resolved. Martin stated that the Respondent was legally obligated to provide a complete proposal and that, at that particular stage in the negotiations, refusing to provide an economic proposal did not constitute good-faith bargaining.

In a letter dated March 30, 2021, Martin wrote to Pascucci providing dates for additional bargaining, and discussing the course of the parties' negotiations. In the letter, Martin stated that the Respondent's failure to provide a proposal encompassing all mandatory subjects of bargaining constituted a refusal to bargain in good faith, and again demanded that the Respondent provide "a complete contract proposal, addressing all mandatory topics." That day, Pascucci replied stating that his approach to negotiations, particularly for first contracts, generally entailed resolving non-economic subjects of bargaining prior to addressing economic topics. Pascucci also asserted that the Union was refusing to bargain regarding the six proposals the Respondent had provided during the negotiations until the Respondent provided a complete proposal. Pascucci further stated that Martin had not provided legal support for his contention that refusing to provide a complete proposal constituted a failure to bargain in good faith.

On April 5, 2021, Martin responded, discussing what he contended were inaccuracies in Pascucci's March 30 email and stating that as the Respondent had never identified legal support for its refusal to provide a complete proposal, the Union was not obligated to legally substantiate its own position. At the final bargaining session on April 21, 2021, the parties reiterated their positions with respect to the mechanics of bargaining, with Pascucci questioning why the Union would not discuss individual topics without a complete proposal from the Respondent, and Martin contending that the Union needed a complete proposal including wages for meaningful bargaining to occur. Martin and Pascucci both stated that they would leave the issue for the Board to decide but would remain in contact regarding issues involving the Respondent's day-to-day operations and staffing.

Discussion

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Collective bargaining is defined in Section 8(d) as "the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." The Supreme Court has explained that good-faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract" and though "the parties need not contract on any specific terms . . . they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485–486 (1960). Accord *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

As the Supreme Court explained long ago, a party's refusal to negotiate about any mandatory subject violates Section 8(a)(5). *Katz*, 369 U.S. at 742–743 ("A refusal to negotiate *in fact* as to any subject which is within § 8 (d), and about which the union seeks to negotiate, violates § 8 (a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end.") (Court's emphasis.); see *Cal-Pacific Furniture*, 228 NLRB 1337, 1341 (1977) ("[A] party's refusal to discuss some mandatory subject of bargaining may constitute a violation of Sec[.] 8(a)(5) regardless of his good-faith bargaining on other matters."). As an extension of these principles, the Board has held that "[g]ood-faith bargaining entails exchange of views on all mandatory bargaining subjects." *Patent Trader, Inc.*, 167 NLRB 842, 853 (1967), enfd. in relevant part 415 F.2d 190 (2d Cir. 1969), modified on other grounds, 426 F.2d 791 (1970) (en banc). Indeed, all mandatory subjects of bargaining must be on the table because "[t]he 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 issues.

'Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas.'" *Cal-Pacific Furniture Mfg. Co.*, 228 NLRB at 1341 (quoting *Korn Industries, Inc. v. NLRB*, 389 F.2d 117, 121 (4th Cir. 1967)), enf. denied on other grounds 580 F.2d 942 (9th Cir. 1978). See also *Rhodes-Holland Chevrolet Co*, 146 NLRB 1304, 1316 (1964) ("[T]here is often an interrelation, as a practical matter, between clauses which, on their face, deal with entirely different subjects and agreement is often reached because one party gives something in one area and the other is therefore willing to modify or withdraw its demand with respect to an apparently unrelated subject."). Based on these principles, the Board and courts have long held that an employer violates Section 8(a)(5) and (1) by insisting on the resolution of all non-economic subjects before negotiating economic subjects. See, e.g., *Detroit Newspapers*, 326 NLRB 700, 704 (1998), revd. on other grounds sub nom. *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (D.C. Cir. 2000); see also *John Wanamaker Philadelphia*, 279 NLRB 1034, 1035 (1986); *South Shore Hospital*, 245 NLRB 848, 857–860 (1979), enfd. 630 F.2d 40 (1st Cir. 1980), cert. denied 450 U.S. 965 (1981); *Adrian Daily Telegram*, 214 NLRB 1103, 1110–1112 (1974).

Applying these principles here, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain regarding economic subjects until all non-economic subjects are resolved.[7] At the second bargaining session on June 4, 2020, the Respondent rejected in its entirety the Union's proposal encompassing all economic and non-economic subjects and then refused to discuss economic subjects. Instead, the Respondent proposed several ground rules, including focusing on non-economic issues prior to addressing economic issues. The Union explicitly rejected this proposed ground rule and requested proposals on economic subjects. Then, when the Union rejected the Respondent's modification of its ground rule regarding addressing noneconomics first, the Respondent nonetheless announced its intention to proceed with negotiations as follows: "In responding to the Union's proposals, the [Respondent] will focus on non-economic subjects first." At the next session on June 25, 2020, the Union requested again that the Respondent provide proposals regarding wages and benefits but the Respondent declined to do so and took the position: "Working on non-economics first, that's our plan." The Respondent then presented a proposal covering only six non-economic subjects that it unilaterally chose. Even though the Union repeatedly requested a comprehensive proposal including economics from the Respondent, the Union still reviewed and discussed the Respondent's six proposals in detail during that session. During the three negotiations that took place after the 7-month hiatus in bargaining caused by the COVID-19 pandemic, the Respondent continued to refuse to discuss economic subjects. Indeed, at the session on February 2, 2021, when the Union again requested a complete proposal including economic subjects, the Respondent stated that it intended to "first work through non[-]economics, get through a half dozen and resolve and then move on to next sets, and then eventually work through economics." At the final bargaining session, the parties' reiterated their positions with respect to the mechanics of bargaining, with the Respondent still adhering to its non-economics-first approach.

Thus, the Respondent never provided any counterproposals on economic subjects. Instead, throughout the entire course of bargaining, the Respondent insisted on discussing non-economic subjects first and continued to do so well after it became apparent that its approach was obstructing the parties' ability to make progress towards reaching an agreement. By refusing to discuss economic subjects for the entire process of bargaining, the Respondent pursued a bargaining strategy that "unreasonably fragmented the negotiations and drastically reduced the parties' bargaining flexibility." *John Wanamaker Philadelphia*, supra, 279 NLRB at 1035. See also *Pillowtex Corp.,* 241 NLRB 40, 47, 49 (1979), enfd. 615 F.2d 917 (5th Cir. 1980) (employer's insistence on resolution of noneconomic subjects before addressing economic subjects "fragmented" the bargaining process); and *Patent Trader, Inc.,* supra, 167 NLRB at 853 (by postponing economic bargaining to the end of the negotiations, the employer "reduced the flexibility of collective bargaining, narrowed the range of possible compromises, and cut off the infinite opportunities for bargaining" (internal quotations and citations omitted)). As a result, the parties expended significant bargaining time discussing how negotiations would be conducted instead of negotiating substantive terms, with the foreseeable result that after six bargaining sessions over the course of 11 months, they failed to reach agreement on a single provision.[8] See *Adrian Daily*

[7] In affirming the judge's finding, we find it unnecessary to rely on the Respondent's unilateral selection of six non-economic subjects for discussion as additional support for the violation.

[8] *Wyman Gordon Pennsylvania, LLC*, 368 NLRB No. 150 (2019), enfd. mem. 836 Fed.Appx. 1 (D.C. Cir. 2020), cited by the Respondent, is distinguishable. There, the Board found, on the particular facts of that case, that the employer's insistence on discussing non-economic subjects first did not unreasonably fragment bargaining or frustrate the parties' ability to reach agreement. Among other things, the parties in that case had initially agreed to a ground rule that non-economic subjects would be discussed first. Indeed, when the employer presented a proposal on an economic subject, the union asked that the proposal be tabled until

Telegram, supra, 214 NLRB at 1110–1112 (employer violated Sec. 8(a)(5) where it refused for the entire 8 months of bargaining to submit a full economic counterproposal or discuss economics until there was agreement on non-economic matters); *John Wanamaker Philadelphia*, supra, 279 NLRB at 1035 (employer violated Sec. 8(a)(5) where it refused to discuss economic subjects for 6 months); see also *Sunbelt Rentals*, 370 NLRB No. 102, slip op at 3–4 (2021) (employer violated Sec. 8(a)(5) where it refused to submit a wage counterproposal for 4 months, despite its previous willingness to discuss other economic subjects).

Our dissenting colleague argues that we have failed to consider the Respondent's bargaining strategy in the context of its overall conduct, which he contends provides no basis for finding that the Respondent unlawfully refused to bargain. In the dissent's view, it was lawful for both parties to adopt bargaining strategies geared toward achieving their bargaining objectives, but that we hold only the Respondent accountable for the parties failing to reach agreement. He asserts that we fail to take into account the Union's desire to bargain from the IWA and its repeated requests for a complete counterproposal based on the IWA, and the Respondent's corresponding bargaining strategy. Finally, our dissenting colleague contends that the Respondent is entitled to legal leeway in bargaining in light of the COVID-19 pandemic. We reject our colleague's position, for the reasons that follow.

To begin, the lawfulness of the Union's bargaining actions is not at issue here. There is no complaint allegation that the Union violated the Act by its bargaining conduct, and there is no evidence in the record that the Respondent filed an unfair labor practice charge alleging that the Union's conduct was unlawful. Moreover, even considering the Union's actions as relevant to whether the Respondent here bargained in good faith, there is no basis for concluding that the Respondent's persistent refusal to bargain over mandatory subjects is somehow excused because of the Union's bargaining conduct. Contrary to our dissenting colleague's suggestion, the Union did not present the IWA on a take-it-or-leave-it basis.[9] Instead, the Union's initial proposal included a MOU modifying the IWA to accommodate the Respondent's specific operational needs. In addition, thereafter, the Union repeatedly emphasized its flexibility with respect to both economics and contract wording and stated that it stood ready to discuss changes proposed by the Respondent. Moreover, we agree with the judge that the Union repeatedly expressed a willingness to address any concerns the Respondent may have had with its contract proposal and demonstrated flexibility by requesting proposals specifically relating to wages, health benefits, and retirement benefits and by bargaining over the limited noneconomic proposals the Respondent unilaterally chose to present. In short, although the Union expressed a preference for using the IWA as a starting point and consistently sought a full counterproposal from the Respondent, the Union continued to bargain without one.

In addition, consistent with precedent and contrary to the dissent's assertion, we have taken into account the Respondent's course of conduct here and, as explained above, have determined that it violated the Act. Parties to bargaining may of course make good-faith proposals for, and agree to, ground rules regarding the sequence in which subjects will be negotiated. See, e.g., *Detroit Newspapers*, supra, 326 NLRB at 703. But here, no such ground rules were agreed to by the parties. And in any event, as explained above, ground rules or not, the parties ultimately have a statutory obligation to discuss all mandatory subjects of bargaining and will violate the Act by insisting indefinitely on the resolution of all non-economic subjects before negotiating economic subjects. Here, the Respondent's repeated insistence on bargaining non-economic issues first—and the correlative refusal to engage on economic issues, long after it became clear that its position was frustrating bargaining, cannot be reconciled with these principles.

Further, we find unpersuasive our dissenting colleague's citation to the decades-old dissenting opinion in *John Wanamaker Philadelphia*, supra, to support the contention that the Board should consider the Respondent's reason for insisting that the parties bargain non-economic matters first. That dissent, like the dissent in this case, framed the issue as one of bargaining leverage, and it suggested that an employer's refusal to make an economic proposal may be excused if the purpose was to force an agreement on the employer's terms rather than to avoid reaching any agreement. Of course, the Board rejected that view, holding instead that the employer's "rigid approach to bargaining [is] at odds with the type of

negotiations reached economic issues. Id., slip op. at 4. In addition, the employer responded to union requests for counterproposals on several non-economic subjects, and the parties made progress toward reaching agreement on those subjects. No such facts are present here. Rather, the Respondent's adamant refusal to discuss economics unreasonably fragmented bargaining for all the reasons stated herein.

[9] In arguing to the contrary, our dissenting colleague seeks to paint the Union in an unfavorable light and wrongly contends that the Union "walked away from the table." As explained above, however, the Union's bargaining actions are not at issue here and, even though the Union indicated a preference to bargain from the IWA, the record amply demonstrates that, apart from the IWA, the Union readily sought to bargain with the Respondent over the limited topics that the Respondent agreed to address.

bargaining contemplated by the Act." Id. at 1035. We believe that *John Wanamaker Philadelphia* was correctly decided, and we follow it here.[10]

Finally, while the COVID-19 pandemic surely had an impact on the Respondent's hotel operations, we disagree both with our dissenting colleague's assertion that it prevented normal, lawful bargaining and with his attempt to excuse the Respondent's failure to bargain on that basis. For its part, the Respondent repeatedly conveyed its intent to resolve non-economic subjects first on the basis that it viewed such approach as the most efficient way to negotiate a first contract, not because of economic uncertainty resulting from the pandemic.[11] But even taking pandemic-related circumstances into account, the Respondent's outright refusal to discuss any economic subjects until all or nearly all non-economic subjects were resolved constituted bad-faith bargaining, as explained above. This is true even though the parties mutually agreed to a bargaining hiatus shortly after the beginning of the pandemic. From the outset of bargaining, the Respondent unilaterally insisted on resolving non-economic subjects first and did so repeatedly before the COVID-related hiatus. After the parties resumed bargaining several months later, the Respondent continued to insist on resolving non-economic subjects first. In this regard, in several bargaining sessions following the end of the hiatus and in related correspondence between the parties, the Respondent adhered to its stated strategy of discussing non-economic subjects first and never gave any indication that it would ever move from its position. Under our precedent, by any reasonable measure, this conduct constitutes an unlawful refusal to bargain regarding economic subjects until all non-economic subjects are resolved.

For all the foregoing reasons, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith, we shall order the Respondent to meet with the Union on request and bargain in good faith concerning the terms and conditions of employment of the bargaining unit employees and, if an agreement is reached, embody such agreement in a signed contract.[12]

We grant the Charging Party's request for a 12-month extension of the certification year pursuant to *Mar-Jac Poultry*, 136 NLRB 785 (1962). As discussed more fully above, beginning with the parties' second bargaining session and continuing throughout the entire bargaining process, the Respondent insisted indefinitely on the resolution of all non-economic subjects before negotiating economic subjects, despite the Union's repeated requests to discuss economic subjects. As a result, the Respondent effectively denied the Union its full opportunity to bargain during the entirety of the certification year.[13] See *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004) (stating the length of an extension is determined by considering the nature of the violations; the number, extent, and dates of the collective-bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations), enfd. mem. 156 Fed.Appx. 331 (D.C. Cir. 2005). Therefore, the Union is entitled to a 12-month extension of the certification year from the time that the Respondent begins to bargain in good faith.

[10] We note our dissenting colleague's further contention that his position in this case is consistent with the majority position in *John Wanamaker Philadelphia*. As explained above, however, *John Wanamaker* stands for the proposition that an employer violates Sec. 8(a)(5) by insisting on resolution of all non-economic subjects of bargaining before negotiating economic subjects. The Respondent here did just that.

[11] At the parties' February 2, 2021 bargaining session, the Respondent's bargaining representative stated: "[T]he way I [negotiate a first contract] is first work through noneconomics, get through a half dozen and resolve and then move on to next sets, and then eventually work through economics." Additionally, in a March 30, 2021 email, the bargaining representative stated: "[I]n my experience having negotiated over 200 collective bargaining agreements, in the overwhelming majority of cases both parties mutually agree to focus on non-economic subjects first, since this is seen as the most efficient way to get to an overall contract, and this has been especially true when negotiating initial contracts in my experience."

[12] Because the Respondent did not except to the judge's recommended affirmative bargaining order, we find it unnecessary to provide a justification for that remedy. See *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002); *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 978 (D.C. Cir. 1998); *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001). In any event, we are ordering a 12-month extension of the certification year. Since the reasonable period during which an affirmative bargaining order insulates a union's majority status from challenge cannot exceed 12 months, *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002), that remedy does not independently affect the rights of employees who may oppose continued union representation.

[13] We acknowledge that the parties appear to have mutually agreed to postpone bargaining between June 2020 and February 2021 due to the COVID-19 pandemic. However, the Respondent never bargained in good faith, with the result that the Union never obtained the benefit of its right to a good-faith bargaining partner during any part of the certification year. Under these circumstances, we believe a 12-month extension is warranted notwithstanding the pandemic-related pause in negotiations.

ORDER

The National Labor Relations Board orders that the Respondent, Troutbrook Company, LLC d/b/a Brooklyn 181 Hospitality, LLC, Brooklyn, New York, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with New York Hotel and Motel Trades Council, AFL–CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit by refusing to bargain regarding economic subjects until non-economic subjects are resolved.

(b) 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 regular part-time front-desk employees, housemen/bellmen, housekeepers, laundry attendants and food and beverage employees employed by the Employer at 181 3rd Avenue, Brooklyn, New York, excluding executive management, sales personnel, fire safety directors, all other employees including guards and supervisors, as defined by the National Labor Relations Act.

The certification year shall extend 12 months from the date the Respondent begins to bargain in good faith.

(b) Post at its Brooklyn, New York facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 29, 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, 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. The Respondent shall take reasonable steps 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 April 22, 2020.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 29 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. December 16, 2022

Lauren McFerran, Chairman

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER RING, dissenting.

The Respondent and the Union set out to negotiate a first contract for a unit of hotel workers in Brooklyn, New York, in May 2020, just as the COVID-19 pandemic was spreading across the nation, with New York City being particularly hard hit at the time.[1] It is difficult to imagine a more challenging setting in which to negotiate any

[14] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

[1] "New York City (NYC) was an epicenter of the coronavirus disease 2019 (COVID-19) outbreak in the United States during spring 2020. During March–May 2020, approximately 203,000 laboratory-confirmed COVID-19 cases were reported to the NYC Department of Health and Mental Hygiene (DOHMH)." See COVID-19 Outbreak—New York City, February 29–June 1, 2020 | MMWR (cdc.gov) (last visited Sept. 6, 2022). The impact of the pandemic on the hotel industry in New York City has been devastating. Carl Campanile, "One-third of NYC hotel rooms have been wiped out by COVID-19 pandemic," *New York Post*, Jan. 26, 2021 (One-third of NYC hotel rooms were wiped out by COVID-19 (nypost.com) (last visited Sept. 6, 2022)).

collective-bargaining agreement, much less a first contract. Although both the Respondent and the Union recognized the serious impact of the pandemic on the hotel industry in New York City generally and the Respondent's business specifically, they brought different bargaining objectives and negotiating strategies to the table. The Union wanted the Respondent to sign its Industry-Wide Agreement with the Hotel Association of New York City, Inc. (the IWA), a detailed and lengthy agreement covering employees at many of the hotels represented by the Union in all parts of the city, including Manhattan.[2] Indeed, the Union insisted that the legal duty to bargain in good faith *required* the Respondent to make a complete counterproposal to that proposed agreement. The Respondent, for its part, entered bargaining with its business hard hit by the pandemic and no desire to sign onto the IWA. The Respondent favored instead a streamlined agreement tailored to its smaller operations and its Brooklyn location and more aligned with its dire business conditions.

Consistent with its desire to negotiate a new agreement from scratch and not sign onto the IWA, the Respondent proposed ground rules for bargaining, including a common ground rule that called for the parties to focus on non-economic subjects before turning to economic subjects. Consistent with its expectation that the Respondent would sign onto the IWA "wholesale," the Union rejected most of the Respondent's proposed ground rules. During the three initial bargaining sessions, the Respondent refused to accede to the Union's demand for a full counterproposal to its industry-standards proposal and instead proposed that the parties negotiate sets of individual proposals, starting with non-economic subjects. The Respondent offered a first set of six such proposals. After a mutually agreed-to 7-month hiatus in bargaining because of the pandemic, the Respondent and Union met twice more, with both parties adhering to their bargaining approaches. The Union then abruptly filed its unfair labor practice charge.

My colleagues adopt the judge's conclusion that the Respondent bargained in bad faith by refusing to abandon its bargaining strategy. I disagree. The Respondent demonstrated a sincere willingness to reach agreement while dealing with the challenging circumstances posed by the pandemic. It reasonably believed that its approach to negotiating a first contract was the best way to achieve that objective, and at the time the Union filed its charge, that approach was no more an impediment to reaching an agreement than was the Union's insistence that the parties bargain on the basis of the IWA. Nothing in the Act compelled either party to change its position at that point in the negotiations. Rather, the Act contemplates that the parties will work out such differences themselves in the first instance. While the Board has held that a party violates Section 8(a)(5) of the Act by refusing *indefinitely* to bargain about economic matters until all non-economic matters are resolved, no such refusal has been proven here. By intervening in the parties' negotiations all the same, my colleagues effectively take a seat at the table and throw the weight of the Board behind the Union's preferred strategy. In so doing, my colleagues undermine, rather than promote, the system of collective bargaining that Congress has established. Accordingly, I respectfully dissent.

Facts

After a unit of the Respondent's hotel employees voted for representation by the Union, the parties began bargaining for an initial contract.[3] Because of the COVID-19 pandemic, all bargaining sessions were conducted by conference call. At the first session on May 18, 2020, the Union proposed that the parties agree to the IWA, as modified by the MOU. The IWA, which is the Union's master agreement covering hundreds of hotels in New York City, is more than 100 pages long. The MOU modified the IWA with respect to certain limited terms, and it also required the Respondent to become part of the IWA multiemployer bargaining unit and to be bound by the terms of the IWA and any amendments to it subsequently negotiated by the Union and the Hotel Association of New York City. At this initial session, Union General Counsel and Executive Vice President Rich Maroko explained the IWA proposal and MOU changes. Having just received the proposal earlier that day, the Respondent's negotiator, Raymond Pascucci, requested time to review it. According to the Respondent's bargaining notes, the session lasted a total of 19 minutes.

At the second bargaining session on June 4, 2020, the Respondent started the meeting by asking if there could be a discussion of ground rules for the negotiations and whether the Union had any to propose.[4] Pascucci described several common ground rules addressing the recording of bargaining sessions, the handling of proposals

[2] The Union's initial proposal included a Memorandum of Understanding (MOU) modifying the IWA's terms in certain limited respects.

[3] The majority references a prior proceeding in which the Respondent was found to have violated the Act by failing and refusing to recognize and bargain with the Union immediately following the Union's certification in Case 29–RC–216327. The prior proceeding involved a test-of-certification 8(a)(5) violation, also known as a technical 8(a)(5) violation, which is the only means for an employer to challenge in court any aspect of the underlying representation case. There should be no adverse inference drawn from the Respondent's exercise of its due process right to seek judicial review.

[4] The description of the parties' bargaining sessions that follows is drawn from the Union's bargaining notes unless otherwise indicated.

and information requests, and the process for documenting tentative agreements. One of the proposed rules called for the parties to focus on non-economic subjects before moving onto economic issues. In response to this proposed rule, Maroko stated that the Union's "preference is to talk about the whole thing," explaining that he was "not limiting [the parties'] ability to talk on any topics. I'm happy to talk about the things you think are most likely to lead to a contract in negotiations." At Maroko's suggestion, the parties agreed that Pascucci would send a written list of proposed ground rules to the Union.

The session then turned to the Union's IWA proposal. Pascucci stated that the Respondent was not willing to sign onto the IWA, explaining that it was "unnecessarily complex and burdensome." He stated that the Respondent preferred to negotiate a simpler contract more appropriate for a small hotel in Brooklyn (as opposed to Manhattan) with a small workforce. Pascucci explained that for these reasons, and in light of the severe loss of business resulting from the COVID-19 pandemic, the Respondent "need[ed] a stand alone CBA for a small business with a small workforce under financial strain. We're looking for a really simple streamlined contract to avoid disputes over interpretations. Those are our goals in these negotiations."

Maroko insisted that the Union wanted the IWA and characterized Pascucci's wholesale rejection of it as a "knee jerk" reaction typical of employers who don't want any agreement. He asserted that there must be some items in the IWA to which the Respondent could agree. Pascucci replied that "[w]e can go topic-by-topic and I'm sure some things will be easy to agree [to]," but noted at least one item (Successor and Assigns) with which the Respondent could not agree. Although the judge did not mention this in her decision, the Union's bargaining notes indicate that Maroko rejected the Respondent's desire to negotiate a stand-alone agreement and insisted that it accept the same terms as other hotels whose employees the Union represents.[5] Nevertheless, Maroko eventually told Pascucci: "Make a proposal and I'll respond." When Pascucci agreed to make a counterproposal to several of the IWA articles, Maroko stated: "Our position is good faith [bargaining] requires a complete proposal." Pascucci responded that, in his experience, "[w]hen it's a first contract and you have 50 open issues on the table, it's a lot harder to make progress than [considering] 4 issues you can discuss and then move on." The parties ended the session by agreeing that Pascucci would send the Union draft ground rules, after which they would schedule the next bargaining session. According to the Respondent's bargaining notes, this second session lasted 16 minutes.

As promised, several hours after the second bargaining session concluded, Pascucci sent the Union an email proposing five ground rules for bargaining.[6] Pascucci also followed up with a second email that same day outlining the five "key points" he had made at the second bargaining session. The email said that the "Hotel is not willing to accept the IWA," and it restated the business rationale for its position. Another key point was that "Covid-19 has decimated the business." Pascucci also reiterated the Respondent's reasons for desiring a stand-alone agreement. Pascucci's "key points" email did not mention bargaining non-economic subjects prior to economic subjects.

The Union agreed to the proposed ground rule prohibiting the recording of bargaining sessions and to the portion of the ground rule for information requests committing the parties to respond within a reasonable timeframe, but it rejected the remaining proposals. In a June 10, 2020 email, Pascucci sought to address the Union's stated concerns over the rejected ground rules. Regarding the proposed ground rule requiring information requests be in writing, for example, Pascucci explained that the proposal "was not intended to limit discussion or preclude either party from verbally asking questions that naturally arise during discourse," but that it is a "longstanding tradition in labor relations for the parties to present any formal request for information in writing as a means of documenting the nature and timing of the requests . . . ." GC Exhibit 2(g). Responding to the Union's rejection of the proposed ground rule calling for non-economic subjects to be addressed before economic subjects, Pascucci explained that the proposal "was not intended to preclude discussion about any and all issues at any point in time," but rather reflected "a longstanding well-established tradition in labor relations as an orderly framework for achieving progress toward an overall collective bargaining agreement." Attempting to address the Union's concerns, Pascucci

[5] Specifically, the Union's bargaining notes for this session include the following exchange:

> Maroko: We feel your workers should be treated the same as the ones we already have under contract.
>
> Pascucci: So you're saying that, it's a one size fits all. You better get in line.
>
> Maroko: Yeah, pretty much.

[6] The proposed ground rules were:

1. There shall be no recording of any bargaining sessions whether in-person or via phone.
2. The parties will focus on non-economic subjects before turning to economic subjects.
3. Any requests for information will be in writing and the response will be provided within a reasonable timeframe.
4. All formal proposals and counterproposals will be in writing.
5. Nothing shall be considered as agreed until the parties have signed a tentative agreement on the subject.

offered a modified proposal: "The parties agree to focus primarily on non-economic subjects before turning to economic subjects, but it is understood that this general framework does not preclude either party from raising or freely discussing any item at any point in the bargaining process." Pascucci likewise offered modified ground rules for each of the other ones the Union had rejected.

The Union responded in a June 15 email from its assistant general counsel, Gideon Martin. Martin began by expressing frustration that the Respondent had not yet provided "a counter proposal covering some, if not all, of the Union's proposed contract terms." Turning to the ground rules proposals, Martin confirmed the two items the Union had accepted, and then rejected all the others. As to the ground rule regarding considering non-economic items first, Martin stated:

> We have proposed a complete contract, covering both economic and non-economic terms. We want to be able to bargain over all such terms without artificial timeline or constraint. We do not believe you can preclude the parties from bringing up certain subjects. The union rejects this proposed ground rule. Let us know if you are refusing to have meaningful discussion on economics until all non-economic subjects are addressed.

In a June 18 email, Pascucci responded that "[i]t was disappointing that the Union is rejecting simple proposed ground rules such as entering into written tentative agreements signed by each party," but that the Respondent "was prepared to move forward without these additional proposed ground rules." He said that the Respondent "certainly cannot dictate the manner in which the Union chooses to negotiate." "[L]ikewise," he added, "the Union cannot dictate the manner in which the [Respondent] will negotiate." His email then outlined how the Respondent would address the areas of bargaining covered by the ground rules rejected by the Union. With respect to requiring written tentative agreements, for example, Pascucci stated that the Respondent "still intend[ed] to enter into written tentative agreements" and that it would "sign these tentative agreements and ask the Union to do the same." If the Union declined, the Respondent would send a followup email setting forth its understanding of the tentative agreement and seek confirmation from the Union of its accuracy. In place of the rejected non-economics/economics ground rule, the Respondent stated: "In responding to the Union's proposals, the Hotel will focus on non-economic subjects first."

The next bargaining session was held on June 25, 2020. At the Union's request, the Respondent opened the meeting with a candid discussion of the impact of the COVID-19 pandemic on hotel operations, including occupancy rates as low as 20 to 50 percent depending on the day of the week, and rooms being offered at a 50-percent discount. The Respondent then presented the Union with six counterproposals, as it had promised to do at the prior session.[7] In describing the proposals, Pascucci explained: "We want our own CBA, not part of a group, simple document based on our facility or property. These [proposals] reflect that. These are non-economic proposals we think make sense to start with maybe and we'll provide more as we move along." In response, Martin asked a few questions and then asked when the Union could expect proposals covering wages and health and retirement benefits. Pascucci responded: "Working on non-economics first, that's our plan. That's our preference, I get it's not your preference. The other major factor is that we don't know what the economics are going to be like," and he further explained that "[w]e're operating according to the status quo currently. My expectation is we remain at status quo for the foreseeable future."

Martin then turned the conversation to the Union's demand for a complete counterproposal to the proposed IWA agreement, and the parties each reiterated their bargaining positions. Pascucci explained that, in his experience, "it is difficult to negotiate everything at once," and that by "go[ing] subset of issues by subset . . . eventually we reach an agreement." Martin provided his position: "We send complete proposals. I know it's more to absorb when it's a management company we don't have a relationship with, but no—I send out a tailored MOU based on our pattern contract. This is how I always do it and I'm confident will [sic] do the same here. That's how it's gone historically." After discussing how the Respondent's six proposals matched up against the Union's complete proposal, the parties engaged in some back-and-forth on the substance of the Respondent's proposals, discussing the discrimination, probationary period, union-security and preamble provisions. At the end of the discussion of the Respondent's proposals, Martin said: "Okay. Understand, okay. Not saying I agree to it all, but I do understand. I think I'd like to take this back and mull it over. Send me the probationary policy when you dig that up. Again, I urge you to talk offline about giving a complete proposal." The parties then agreed to a next bargaining date, and the Union requested an interim update on COVID impacts.

[7] In addition to a proposed Preamble, the Respondent submitted proposals covering the following: Recognition, No Discrimination, No Strikes or Lockouts, New Employees (probationary period), Hours of Work, and Effective Dates of a contract.

According to the Respondent's bargaining notes, the session lasted a total of 33 minutes.

Due to the COVID-19 pandemic, the parties did not meet again for seven months. The judge found that the hiatus in bargaining was caused by the serious effect of the COVID-19 pandemic on the New York City hospitality industry, including the Union's members and the Respondent's business. As the judge observed, "[t]here is no contention that the hiatus was caused by or evinced bad faith on the part of Respondent, or that Respondent refused to meet with the Union during this period."

After the hiatus, the parties resumed bargaining on February 2, 2021. Martin opened the call by acknowledging that things were "dark and devastating" then, but he expressed the hope that business would improve with the rollout of COVID-19 vaccines, for which hotel workers might soon be eligible. He then asked for an update from the Respondent on the pandemic's impact on hotel operations. The Respondent informed the Union that the situation at the hotel continued to be "very bleak." Not only did occupancy rates remain "very low," but the room rates the Respondent could charge continued to be much lower than what it previously charged. The parties discussed how best to keep the Union apprised of the hotel's status.

The session then turned to substantive bargaining. Although the parties ended their last session prior to the hiatus discussing the Respondent's six non-economic proposals, the Union reverted to its position that the Respondent was legally required to provide a complete counterproposal to the IWA. Additionally, although it offered some flexibility in negotiating changes to the IWA, the Union made clear that negotiations had to be based on the IWA. Martin declared: "[I]'m not going to buy the wholesale [IWA is] not gonna work for you because it's not reality." The parties debated each other's bargaining approach without discussing any specifics and then scheduled another bargaining date. According to the Respondent's bargaining notes, the session lasted 22 minutes.

The next bargaining session was held on March 11, 2021, and most of the call was focused on the status of the hotel as the COVID-19 pandemic continued. The Respondent reported that COVID-related restrictions on interstate travel would soon be lifted, but that business remained poor both in terms of occupancy and rates. The Respondent's director of finance explained:

> Hopefully the industry is coming back, but we haven't seen any of that. We are aggressively pushing business, but it's not happening. All these things [the lifting of restrictions] are just happening this week, so we are not seeing it on our end, but we are constantly pursuing business. Ray [Pascucci] mentioned the rates that are approximately going for [a half or a third of normal] and occupancy is low—40 to 45 percent at the most.

The Union acknowledged the tenuous business conditions caused by COVID, with Martin stating, "We'll hope for a swift turn and I'm not being overly optimistic about that in the near future." After some follow-up discussions about operations, employee layoffs and the Union obtaining information about the Respondent's business forecast, the parties turned to substantive bargaining.

Martin led off by stating that the Union wanted to "sign [the Respondent] onto the pattern contract." He explained that he would be willing to negotiate modifications to the IWA, and he could "come up with as many deals and breaks [as necessary] to come up with a deal." He acknowledged that the Respondent was not interested in the IWA, which Pascucci confirmed continued to be the case:

> We've told you exactly what we are interested in. It's not the pattern contract, we want a contract that reflects this business—a small hotel in Brooklyn, etcetera. One challenge is to negotiate our own contract, the other issue is it's questionable what the future is going to be. In this environment, we're not interested in signing onto your pattern contract that's designed for big hotels in Manhattan and it has never been our intention.

Martin replied that the Respondent was required to provide a complete proposal, to which Pascucci responded that he knew the Union preferred to negotiate the contract all at once, but he did not. And he reminded Martin that the Respondent had given the Union proposals on several items to which the Union still had not responded.

The Respondent summed up the parties' different bargaining styles, noting that the Union preferred to negotiate an entire contract all at once, whereas the Respondent preferred to work on small subsets of issues. The Union's bargaining representative acknowledged "that different attorneys have different ways of negotiating," but he reiterated his belief that good-faith bargaining required the Respondent to present a complete counterproposal. Explaining that he had never negotiated all topics, including economics, from the start of negotiations, Pascucci stated: "I understand your model is consistent with signing onto the pattern contract, but this hotel is not interested in signing onto the pattern contract." Martin responded that his demand for a complete counterproposal was "more than a difference in [negotiating] style," and stated once again the Union's position that "[t]he Hotel is obligated according to the NLRA to give a complete proposal." Martin further asserted that "after this many meetings and emails, it's not good faith bargaining to refuse [to make] economic

proposal[s]." After questioning the legal authority for the Union's position, the Respondent explained that it was unable to provide a full economic proposal because its financial situation was so poor that it had not been making full payments on its bank loan and had no idea what action its lender might take in response.[8] Martin acknowledged that "times were tough." According to the Respondent's bargaining notes, the session lasted approximately 57 minutes.

Roughly 2 weeks later, on March 30, 2021, Martin sent Pascucci a letter that said, "Over one (1) year ago," the Union sent the Respondent a "complete proposal that addressed, *inter alia,* all mandatory topics of bargaining." The letter accused the Respondent of "insist[ing] in no uncertain terms that, prior to even discussing economic topics, the parties resolve the topics contained in the Hotel's first proposal . . . ." Martin said it was the Union's position that the Respondent's failure to provide a complete counterproposal to the Union's IWA proposal was a failure to bargain in good faith. Reiterating the Union's demand for a complete counterproposal, Martin suggested dates for future bargaining sessions.

Pascucci responded the same day. He acknowledged the differences between the parties' bargaining approaches, repeated the reasons he favored bargaining over subsets of proposals rather than a complete counterproposal, and noted that Martin himself had "acknowledged [that] many negotiators may prefer to proceed in this manner, especially when negotiating an initial collective bargaining agreement . . . ." Pascucci renewed his request for legal support for the Union's position that an employer must provide a full counterproposal on all bargaining subjects, explaining that he had "never [in his 36-year career] approached bargaining by a mutual exchange of proposals on all subjects at the [outset]." Pascucci also stated that he "under[stood] that [the Union's] approach is consistent with [the Union's] objective of imposing an industry-wide master agreement on all newly unionized hotels," but that the Respondent "had no intention of signing onto the Union's master contract," preferring instead to negotiate its own contract better reflecting the Respondent's business and operations. Pascucci rejected as "factually inaccurate" Martin's assertion that the Respondent had "flatly refused to even consider bargaining over any economic subjects until all non-economic subjects have been resolved," and stated that the Respondent "never made an absolute unilateral declaration about how bargaining must proceed" in this case. Rather, Pascucci said, it was the Union that had been inflexible about how bargaining would be conducted "by flatly refusing to even consider the Hotel's opening set of counter proposals."

Martin responded on April 5, with an email attaching a copy of the unfair labor practice charge he said would be filed that day. Addressing what he contended were several inaccuracies in Pascucci's email, Martin stated the Respondent's "mere preference" for its bargaining strategy was required to give way to the Union's demand for a full counterproposal. "To date," he declared, "I have asked you for a complete proposal numerous times. I have stated unequivocally the position of the Union that the failure to do so is not bargaining in good faith."

The parties met one final time, on April 21, 2021. No further progress was made. As far as the record shows, there has been no bargaining while the parties await resolution of the Union's charge.

Discussion

The obligation to bargain defined in Section 8(d) of the Act requires unions and employers 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." 29 U.S.C. § 158(d). When an employer is alleged to have failed its duty to bargain in good faith in violation of Section 8(a)(5) of the Act, the Board considers the totality of its conduct to determine "whether the employer [was] engaging in hard but lawful bargaining to achieve a contract that it consider[ed] desirable or [was] unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003).

The Respondent fully satisfied its duty to bargain in good faith under this standard. First, its overall conduct demonstrated a sincere willingness to reach an agreement. The Respondent utilized an experienced negotiator as its bargaining representative, promptly communicated its availability for bargaining sessions, attended all of the scheduled sessions, and promptly responded to the Union's correspondence concerning future bargaining dates and the parties' respective positions.[9] The Respondent

[8] The Respondent's finance director stated:

> We don't even know what the lender has for us. We are not even making full payments on the loan. I don't know how we can bargain when we don't even know what [the lender is] going to say to us. We're trying to apply for another loan. There's no communication at all, radio silence. I send emails every day, I give whatever they request on a monthly basis. We ask questions and they don't reply to us. That's another factor, we don't even know what's gonna happen.

[9] *Sunbelt Rentals, Inc.*, 370 NLRB No. 102 (2021), cited by the judge, is therefore distinguishable. There, the Board found unlawful the employer's refusal to submit a wage proposal for 4 months, against a backdrop of the employer also failing to meet at reasonable times, engaging

timely proposed well-recognized ground rules for bargaining and showed a willingness to compromise in negotiating those rules. In addition, the Respondent offered substantive written proposals, all of which reflected a desire to reach an agreement.[10] To the extent there was delay in bargaining, it was caused by the pandemic, not the Respondent. The Respondent resisted the Union's demands that it make a complete counterproposal, but those demands were accompanied by the Union's unwavering (and incorrect) stance that a comprehensive counterproposal was legally required and its insistence on bargaining from the IWA. Agreeing to bargain from the IWA would have been a significant concession by the Respondent in light of its clear position that it wanted a different agreement. The Respondent was determined not to make that concession, as was its right under Section 8(d). And any resistance on the part of the Respondent to providing an economic proposal was consistent with its preference to initially address groups of individual non-economic proposals as well as reasonably based on the Hotel's "very bleak" COVID-induced business conditions, as the Respondent repeatedly explained during negotiations and the Union acknowledged.

Second, the Respondent's refusal to accept the Union's proposal to bargain on the basis of the IWA does not evidence bad-faith bargaining. The Respondent was under no obligation to accede to the Union's demand that it sign onto the IWA or bargain on the basis of its provisions.[11] Moreover, the Respondent reasonably explained the rationale for its bargaining position. It said that it did not think the IWA made sense for its small hotel operation under financial strain due to the unprecedented business conditions caused by the pandemic, and thus it chose not to work from the Union's proposal. The Respondent also explained its reasonable position that the parties were more likely to reach an agreement by addressing one set of topics at a time than by bargaining over a complete counterproposal under the particular circumstances presented here. Bargaining non-economic matters first has been a common bargaining strategy for decades.[12] As Pascucci explained, that strategy was especially justified here because the devastating impact of the COVID-19 pandemic on the entire hotel industry in New York City generally, and the pandemic-induced financial challenges and uncertainties confronting the Respondent specifically, meant that its economic proposals would be very lean. Notably, the Union's bargaining representative repeatedly acknowledged the difficult and uncertain business situation facing the Respondent but nevertheless continued to demand a full counterproposal. Moreover, Pascucci made clear that his proposal to focus on non-economic subjects first "was not intended to preclude discussion about any and all issues at any point in time." Indeed, the Respondent's modified ground rule regarding addressing non-economics first stated that "it is understood that this general framework does not preclude either party from raising or freely discussing any item at any point in the bargaining process." Accordingly, the record simply does not support the claim that the Respondent refused to engage on economic subjects.

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in surface bargaining, and committing other unfair labor practices, and under circumstances indicating that the employer was delaying its wage proposal precisely in order to avoid reaching an agreement. No such facts are present here.

[10] Cf. *American Automatic Sprinkler Systems, Inc.*, 323 NLRB 920 (1997) (employer violated the Act when, *inter alia*, it offered a proposal that would allow it to operate nonunion and eliminated benefits), enfd. in part 163 F.3d 209 (4th Cir. 1998), cert. denied 528 U.S. 821 (1999).

[11] The majority states that the Union did not present the IWA on a take-it-or-leave-it basis. The record demonstrates otherwise. At the second bargaining session—the first where the IWA was discussed in any detail—the Union agreed with the Respondent's characterization of the Union's position with respect to the IWA as "a one size fits all. You better get in line." At the next bargaining session, Martin expressly stated that the Union wanted the Respondent to sign on to the pattern contract. My colleagues point to the Union's "flexibility with respect to both economics and contract wording" as evidence that the Union was not demanding that the Respondent accept the IWA. But signing on to a lengthy, preexisting industrywide agreement—even with modified economics and wording—commits an employer to significant and often unknowable obligations. Here, the Respondent would have become bound by the hundreds of other provisions contained in the pattern contract, bound by unwritten interpretations of those provisions as well as past practices, and bound to any subsequent changes negotiated by the Union and the Hotel Association. Signing on to the pattern also would have bound the Respondent to become part of the multiemployer bargaining unit, something with significant legal ramifications. Considering the Union's stated position that the Respondent's "workers should be treated the same as the ones we already have under contract," it is unlikely its flexibility as to "contract wording" would have extended to a willingness to modify any of these basic features of the IWA pattern contract. And unfortunately, we do not know the full extent of the Union's flexibility in modifying the IWA because despite Pascucci's offer to "go topic-by-topic" through the IWA because "I'm sure some things will be easy to agree to," the Union stuck to its all-or-nothing demand for a complete counterproposal. In sum, the Union's conduct throughout bargaining demonstrates that it intended to negotiate on a take-it-or-leave-it basis. Although it claimed to be willing to discuss certain issues, that claimed willingness was conditioned on the Respondent's acceptance of the IWA template. And when the Union was unable to negotiate the IWA on a take-or-leave it basis, it walked away from the table.

[12] Nearly 50 years ago, former Chairman Miller correctly observed that bargaining noneconomic matters first is "in accord with bargaining practices generally," and he explained that this sequence of bargaining tends to increase the likelihood of reaching agreement rather than preventing it. For these reasons, any suggestion that it is improper for an employer to insist on non-economic issues being resolved before bargaining proceeds to a full consideration of economic issues would show an "embarrassing naivete about the practical aspects of labor-management negotiations." *Federal Mogul Corporation*, 212 NLRB 950, 958 (1974) (Chairman Miller, dissenting) (cleaned up), enfd. 524 F.2d 37 (6th Cir. 1975).

Significantly, the Respondent made substantive proposals in an effort to move negotiations forward. At the Union's request, it offered written proposals on six subjects at the parties' third bargaining session on June 25, 2020. While the Union was willing to engage on those proposals only to a limited extent, the parties' discussions regarding the proposals did precisely what the Respondent said its bargaining strategy would do: start a dialogue about substantive topics. But despite some preliminary discussion of the Respondent's proposals at the third bargaining session, the Union steadfastly refused to engage in substantive negotiations regarding those proposals or any other potential topics thereafter unless they were incorporated in a full counterproposal. Neither rejecting the Union's proposal nor refusing to respond in the manner the Union demanded, at this stage in the negotiations, evidenced bad-faith bargaining. See *Wyman Gordon Pennsylvania, LLC*, 368 NLRB No. 150 (2019) (employer lawfully insisted on discussing non-economic subjects first, where it did not insist that the union accept its proposals before it would discuss economic subjects or refuse to discuss economics at a point where discussions on non-economic subjects had reached a stalemate), enfd. mem. 836 Fed.Appx. 1 (D.C. Cir. 2020).

The environment within which these negotiations were carried out also cannot be disregarded. As both parties recognized, the challenges presented by the unprecedented COVID-19 pandemic prevented anything resembling normal bargaining. To start, the parties were forced to bargain by conference call, which is itself a departure from the normal practice of meeting in person. The parties were then forced to take a 7-month hiatus in the negotiations because of COVID—a very rare occurrence in any negotiations but certainly in negotiations for a first contract. After this extended interruption, it would be unreasonable to expect that the parties would pick up negotiations where they had left off when they returned to the virtual table. Reasonably, a primary focus of the first post-hiatus meeting was the Respondent's tenuous business situation, which both parties acknowledged was dire. Under these circumstances, there is simply no valid basis for second-guessing the Respondent's position that advancing economic proposals at that time would not further any prospect of reaching agreement. And at this early stage of these interrupted negotiations, there is no valid basis to conclude that the parties were at a stalemate.

My colleagues affirm the judge's finding of bad-faith bargaining all the same. They find that the Respondent refused to discuss economic subjects for the entire period beginning June 4, 2020, and they hold that this refusal constituted bad-faith bargaining. While focusing on the Respondent's adherence to its preferred bargaining strategy of addressing non-economic matters first, my colleagues insist that it did so for too long a time and therefore violated the Act. I strongly disagree.

To start, the majority's singular focus on the Respondent's bargaining tactics runs counter to well-established Supreme Court and Board precedent, which requires that the totality of bargaining conduct be considered in determining whether there has been a failure to bargain in good faith. *NLRB v American National Insurance Co.*, 343 U.S. 395, 410 (1952) ("[A] statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case."); *Detroit Newspapers*, 326 NLRB 700, 703 (1998) ("[T]he Board reviews the entire course of challenged conduct to see if it reveals a purpose to delay and frustrate bargaining."), revd. on other grounds sub nom. *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (D.C. Cir. 2000).[13] The majority's refusal to consider the other circumstances of this case cannot be reconciled with this precedent.[14]

To be sure, the Board has held that a party's insistence on bargaining non-economic subjects first can constitute bad-faith bargaining under certain circumstances. But even there, the Board has been careful to consider the party's bargaining strategy in the context of its overall conduct. See, e.g., *John Wanamaker Philadelphia*, 279 NLRB 1034, 1035 (1986) ("[W]e find that the Respondent's withholding of wage and benefit increases from unit employees further obstructed bargaining and aggravated the Respondent's refusal to discuss economics."); *The Adrian Daily Telegram*, 214 NLRB 1103, 1112 (1974)

[13] *NLRB v. Katz*, 369 U.S. 736, 747 (1962), cited by my colleagues, is not to the contrary. The question presented in that case was whether the employer had violated Sec. 8(a)(5) by unliterally changing a term or condition of employment while the parties were in negotiations for a collective-bargaining agreement. In addressing that issue, the court stated that a "refusal to negotiate *in fact* as to any subject which is within § 8 (d), and about which the union seeks to negotiate, violates § 8 (a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end." That statement, however, did not imply, and cannot reasonably be read to imply, that parties must negotiate every term or condition of employment immediately or simultaneously or that it is a *per se* violation of the Act whenever a party fails to do so. Moreover, the Respondent never refused to negotiate on any subject. Pascucci made clear that his proposal to focus on non-economic subjects first "was not intended to preclude discussion about any and all issues at any point in time." And the Respondent's modified ground rule regarding addressing noneconomics first stated that "it is understood that this general framework does not preclude either party from raising or freely discussing any item at any point in the bargaining process."

[14] My colleagues insist that they have considered the totality of the Respondent's conduct, but the only evidence on which they rely to find a violation of the Act is the Respondent's failure to make a proposal on economic matters.

("This finding of bad-faith bargaining is buttressed in part by evidence establishing that Company Negotiator Baysinger refused to supply Union Negotiator Hatch with certain economic information which had been requested during the bargaining sessions."). The majority unjustifiably fails to do so here.

Moreover, although nine months had passed from the start of negotiations, the parties were not at the bargaining table for anything approaching nine months. They had three initial bargaining sessions amounting to about an hour and a half of negotiations over a 6-week period. There was then a 7-month hiatus in bargaining caused by the pandemic. When the parties resumed negotiations after that hiatus, they met two more times, with each session lasting about 20 to 30 minutes. At most, the parties had been actively engaged in actual bargaining for only 13 weeks when the Union filed its charge. Nor is there any valid basis for finding that the Respondent's focus on non-economic subjects over the course of five limited bargaining sessions over approximately 2-1/2 months amounts to an unlawful "indefinite" refusal to bargain over economic subjects until all non-economic matters were resolved.[15] While a continued insistence on addressing non-economic subjects might support a finding of bad-faith bargaining at some point in time, the point of "indefinite insistence" had not been reached by the parties' last bargaining session on April 21, 2021.[16]

In this respect, any realistic appraisal of the parties' conduct must take into account the Union's insistence on a complete counterproposal based on the IWA, in support of its position that the Respondent should accept the IWA as modified by the proposed MOU. The parties had different positions on that issue, and it was lawful for them to do so. It was equally lawful for the parties to adopt bargaining strategies geared toward achieving their lawful bargaining objective under the circumstances presented here. Yet the majority blames the Respondent, alone, for the fact that the parties failed to reach agreement.[17]

Beyond failing to consider the necessary facts, my colleagues' singular focus on the Respondent's bargaining strategy prevents them from reaching the determinative issue required by our precedent, which is the *reason* for a party's collective-bargaining strategy. See *Public Service Co. of Oklahoma (PSO)*, 334 NLRB at 487 (holding that the Board considers the totality of a party's conduct to determine "whether the employer [was] engaging in hard but lawful bargaining to achieve a contract that it consider[ed] desirable or [was] unlawfully endeavoring to frustrate the possibility of arriving at any agreement."). In a case like this one, the question that must be addressed is, *why* did the party employ its bargaining strategy? If the Respondent's bargaining strategy was employed to avoid reaching an agreement, the Respondent violated the Act. If its bargaining strategy was used to obtain a contract the Respondent desired, there can be no violation.[18] Here, the record as a whole strongly supports a finding that the Respondent's overall conduct demonstrated a sincere desire to reach an agreement on its terms: a standalone agreement not based on the IWA, suitable to the needs of its business in light of the ongoing impacts of the COVID-19 pandemic.

By finding a violation under these circumstances, my colleagues effectively require an employer to immediately address economic issues as soon as the union demands

[15] See *John Wanamaker Philadelphia*, supra (violation found, where employer refused to discuss economics for over 6 months and more than 13 bargaining sessions); *The Adrian Daily Telegram*, supra (violation found, where employer refused to provide wage proposal for more than five months and 14 bargaining sessions); *South Shore Hospital*, 245 NLRB 848 (1979) (violation found, where employer refused to provide economic proposal after 21 meetings over 10 months), enfd. 630 F.2d 40 (1st Cir. 1980), cert. denied 450 U.S. 965 (1981); *Federal Mogul Corporation*, supra (violation found after 24 bargaining sessions over approximately 10 months).

[16] The majority cites cases they say stand for the proposition that "all mandatory subjects must be on the table." But those cases cannot be read to compel parties to put all mandatory subjects on the table at the same time or immediately because to do so would bring those cases into conflict with precedent holding that a party may lawfully insist on bargaining non-economic subjects first so long as it does not insist on doing so indefinitely. See *Wyman Gordon Pennsylvania, LLC*, supra, and cases discussed therein. As explained above, the Respondent did not insist indefinitely on bargaining non-economic subjects first.

[17] Contrary to the majority, I neither question the lawfulness of the Union's bargaining conduct nor believe one party's bargaining conduct can excuse another party's alleged unlawful bargaining. However, the Board is required to consider the totality of a party's conduct in determining whether there was a failure to bargain in good faith, including its responses and reactions to the other party's bargaining conduct and other sources of frustration, such as the other party walking away from the table. For this reason, the Union's conduct is essential to the analysis here. By failing to fully consider all the facts of this case, the majority not only disregards the Supreme Court's command to take into consideration all "the particular facts of [the] particular case," *NLRB v American National Insurance Co*., 343 U.S. at 410, they also fail to evaluate evidence essential to reasoned decision-making under our precedent.

[18] See *John Wanamaker Philadelphia*, 279 NLRB at 1037 (Chairman Dotson, dissenting) ("The question in cases of this type . . . is not the bargaining technique employed. It is rather the ends for which the technique is employed. If the technique is used to avoid agreement, the [r]espondent has violated Section 8(a)(5) and (1). If used to obtain a desired contract, no violation is shown."). The majority contends my agreement with this analysis means that I am relying on the dissent as opposed to the majority decision in *John Wanamaker.* To be clear, I agree with the majority that *John Wanamaker* was correctly decided, and I believe it supports my position and is contrary to the majority's, although my colleagues say they are following it. In finding bad-faith bargaining in *John Wanamaker*, the Board majority found that the employer "unreasonably fragmented the negotiations" by insisting indefinitely that all non-economic issues be fully resolved before it would discuss any proposals on economic issues. 279 NLRB at 1034-1035. The Respondent never did any such thing.

bargaining on those subjects. While I agree with my colleagues that the Act requires both parties to negotiate over all terms and conditions of employment, no precedent supports a finding that the Respondent was obligated to make a complete counterproposal either at the time the Union first requested one or by the time the parties held their final bargaining session. By finding otherwise, the majority effectively sides with the Union's bargaining strategy over the Respondent's and, indirectly, with the Union's substantive bargaining position over the Respondent's position. By taking that step, the majority contravenes the national labor policy established by Congress, which prohibits the Board from directly or indirectly compelling concessions or otherwise sitting in judgment on the substantive terms of collective-bargaining agreements. *NLRB v. American National Insurance Co*., 343 U.S. 395, 401–404 (1952). In sum, the Act does not "contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." *NLRB v. Insurance Agents International Union,* 361 U.S. 477, 490 (1960).

For all these reasons, I would dismiss the allegation that the Respondent violated Section 8(a)(5) and (1) by failing to bargain in good faith.[19]

Conclusion

Practically speaking, the Union's premature resort to the Board has left the unit employees without a collective-bargaining agreement for more than two years. The majority faults the Respondent for this delay, but the Union's decision to walk away from the table was unjustified for all the reasons stated above. Even assuming that the Respondent nevertheless agrees to comply with the majority's decision or a court enforces it, the parties will resume bargaining where they left off. While the Union will get the economic proposals it demanded, it is hard to imagine that the unit employees will be better off than they would have been if the Union had remained at the bargaining table and attempted to resolve the parties' differences there. In the meantime, the parties' labor-management relations are in limbo, and there remain no labor contract protections for the Respondent's unit employees during one of the most consequential periods ever faced by hotel workers in New York City. These employees will no doubt begin questioning the effectiveness of their union, even with the victory handed to it by the majority. Such inevitable disaffection was completely avoidable and will be difficult to reverse. Nothing in today's decision can change that fact.

My colleagues often cite the principle that the Act was intended to promote collective bargaining, and certainly for those who choose to unionize, promotion of collective bargaining is among the Act's primary purposes. In furtherance of this goal, the Act leaves it to the parties in the first instance to work out their differences, subject only to limited supervision by the Board of the collective-bargaining process to ensure that all parties bargain in good faith. That process often does not conform to textbook ideals. It can be and frequently is messy, bumpy, frustrating, and laborious. With all due respect to my colleagues, I believe that their appraisal of these negotiations fails to account for these realities. As a result, they intervene prematurely and thereby undermine the system of private collective bargaining that the Act was designed to promote. Accordingly, for all the foregoing reasons, I respectfully dissent.

Dated, Washington, D.C. December 16, 2022

John F. Ring, Member

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 New York Hotel and Motel Trades Council, AFL–CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit by refusing to bargain regarding economic subjects until noneconomic subjects are resolved.

[19] Because I would find that the Respondent did not bargain in bad faith, I would also deny the Charging Party's request for an extension of the Union's certification year under *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

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 regular part-time front-desk employees, housemen/bellmen, housekeepers, laundry attendants and food and beverage employees employed by the Employer at 181 3rd Avenue, Brooklyn, New York, excluding executive management, sales personnel, fire safety directors, all other employees including guards and supervisors, as defined by the National Labor Relations Act.

TROUTBROOK COMPANY, LLC, D/B/A BROOKLYN 181 HOSPITALITY, LLC

The Board's decision can be found at http://www.nlrb.gov/case/29-CA-275229 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.

Brent Childerhose, Esq., for the General Counsel.
Raymond Pascucci, Esq. and *Louis DiLorenzo, Esq. (Bond, Schoeneck & King, PLLC),* of Syracuse, New York, for the Respondent.
Gideon Martin, Esq., New York Hotel and Motel Trades Council, AFL–CIO, of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge filed on April 5, 2021, by New York Hotel and Motel Trades Council, AFL–CIO (HTC or the Union), on June 17, 2021, the Regional Director, Region 29, issued a Complaint and Notice of Hearing against Troutbrook Company, LLC d/b/a Brooklyn 181 Hospitality LLC (Troutbrook or the Hotel). The Complaint alleges that Troutbrook violated Sections 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively and in good faith with HTC by its overall conduct, including: (a) refusing to provide comprehensive counterproposals; (b) restricting the non-economic subjects over which it would bargain; and (c) refusing to bargain regarding economic subjects until all non-economic subjects of bargaining were resolved. Troutbrook filed an Answer on July 1, 2021 denying the Complaint's material allegations.

This case was tried before me by videoconference, on August 3, 2021.[1] On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel (General Counsel), and Troutbrook, I make the following

FINDINGS OF FACT

I. JURISDICTION

Troutbrook, a limited liability company which owns a hotel located at 181 3rd Avenue, Brooklyn, New York admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Troutbrook also admits, and I find, that HTC is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties, HTC's Certification, and Previous Proceedings

The instant case involves bargaining for a first contract after protracted litigation involving objections and challenges to HTC's certification by the Board following a representation election. On June 26, 2018, the Board conducted a representation election among Troutbrook's employees in the following bargaining unit:

> *Included*: All full-time and regular part-time front-desk employees, housemen/bellmen, housekeepers, laundry attendants and food and beverage employees employed by the Employer at 181 3rd Avenue, Brooklyn, New York.
>
> *Excluded*: Executive management, sales personnel, fire safety directors, all other employees including guards and supervisors, as defined by the National Labor Relations Act.

On August 3, 2018, the Regional Director ordered that a re-run election be conducted based upon Troutbrook's objections.[2] The re-run election was conducted on September 6, 2018, and a majority of the bargaining unit employees voting in that election selected HTC as their exclusive collective bargaining representative. Thus, on September 24, 2018, the Regional Director for Region 22, certified HTC as the exclusive collective bargaining

[1] No party has raised any objection to conducting the hearing by videoconference or to any specific aspect of the videoconference hearing process.

[2] The Regional Director determined that Troutbrook had posted an inaccurate Notice of Election and ordered a rerun election based on Troutbrook's objection in that regard. Because the Regional Director ordered a rerun election on this basis, he did not address Troutbrook's multiple objections alleging that HTC engaged in preelection misconduct. See GC Exh. 2(a), p. 2.

representative of the bargaining unit employees. Troutbrook admits and I find that at all times since September 24, 2018, HTC has been the exclusive collective bargaining representative of the employees in the above bargaining unit pursuant to Section 9(a) of the Act.

After the second election, Troutbrook filed objections which were "nearly identical" to the elections it had filed after the first election, pertaining to HTC's alleged pre-election misconduct. (GC Exh. 2(a), p. 2.) The Regional Director overruled these objections on the grounds that they pertained to events which occurred prior to the first election, and therefore took place outside the critical period for the second election. See *Singer Co.*, 161 NLRB 956, 956 fn. 2 (1966) (critical period for a second election begins on the date of the first election and ends on the date of the second election); *Nestle Co.*, 248 NLRB 732, 733 fn. 3 (1980), enf'd. 659 F.2d 252 (D.C. Cir. 1981). Troutbrook requested review of the Regional Director's decision to certify the results of the second election, which the Board denied on December 13, 2018. *Troutbrook Co.*, 367 NLRB No. 56.

Troutbrook then refused to bargain with HTC in order to obtain appellate review of the certification and the Board's dismissal of its objections. In a Decision and Order dated June 3, 2019, the Board granted General Counsel's Motion for Summary Judgment, and issued an order requiring that Troutbrook bargain with HTC. *Troutbrook Co.*, 367 NLRB No.139. In its decision, the Board rejected Troutbrook's contention that HTC's alleged misconduct prior to the first election had a "continuing impact" on the re-run election which led to HTC's certification, stating that Troutbrook had offered no evidence to support this contention and had not filed unfair labor practices relating to HTC's alleged misconduct. *Troutbrook Co.*, 367 NLRB No. 139 at p. 2, fn. 2.

Troutbrook subsequently filed a Petition for Review of the Board's June 3, 2019 order with the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a Cross-Application for Enforcement. The District of Columbia Circuit issued a Judgment on February 28, 2020 denying Troutbrook's Petition for Review and granting the Board's Cross-Application for Enforcement. (GC Exh. 2(a), pp. 1–4); *Troutbrook Company, LLC v. NLRB*, 801 Fed.Appx. 781. On April 22, 2020, the District of Columbia Circuit issued its mandate in connection with the February 28, 2020 Judgment. G.C. Ex. 2(b).

B. The Parties' Collective Bargaining Negotiations

After the District of Columbia Circuit issued its mandate, Troutbrook and HTC began negotiations for an initial collective bargaining agreement. The parties have met six times since April 22, 2020, on May 18, 2020, June 4 and 25, 2020, February 2, 2021, March 11, 2021, and April 21, 2021. (GC Exh. 2(c, e, h, j, m, p); R.S. Exh. 1.) All negotiating sessions have taken place by telephone conference due to the impact of the COVID-19 pandemic. (Tr. 17; R.S. Exh. 1.) The principal spokespersons for the parties have been Assistant General Counsel Gideon Martin for the Union and Attorney Raymond Pascucci for the Hotel. Martin testified for General Counsel at the hearing, and Pascucci testified on behalf of Troutbrook.

There is little factual dispute regarding the course of collective bargaining in this case. During their testimony, Martin and Pascucci identified their respective parties' notes of the negotiating sessions, which were admitted into evidence without objection, and explained the Union and Troutbrook's negotiating strategies. (Tr. 18–20.) Martin testified that the Union's notes were not verbatim transcripts, but captured all of the substance of the various negotiating sessions, and Pascucci, who was cross-examining Martin at the time, agreed. (Tr. 45–46.) Martin and Pascucci both testified that they had reviewed the notes of the negotiating sessions prepared by the Respondent and the Union, respectively, and that the other party's notes contained nothing inaccurate. (Tr. 60, 87.) Thus, the following account of the parties' bargaining is based primarily on their notes of the negotiating sessions, in evidence as General Counsel's Exhibits 2(c), (e), (h), (j), (m), and (p), and Respondent's Exhibit 1. I note in that respect that the Union's notes in evidence as subparagraphs of General Counsel Exhibit 2 are significantly more detailed in terms of the discussions during negotiations than are the Hotel's notes in evidence as Respondent's Exhibit 1, and that the Hotel's notes are more summary.

The parties first negotiating session took place on May 18, 2020. (Tr. 17–20; GC Exh. 2(c); R.S. Exh. 1.) General Counsel and Executive Vice President Rich Maroko attended this session for HTC and was the Union's chief spokesperson, with Martin and Assistant Director of Organizing Arisha Sierra-Blas also present. Pascucci attended with Accounting Manager Ben Crespi for the Hotel. Earlier that day, prior to the session, Martin had sent Pascucci the Union's proposal, which consisted of its Industry-Wide Agreement with the Hotel Association of New York City, Inc. (the IWA), together with a Memorandum of Understanding (the Rider) modifying the IWA's terms with respect to Troutbrook. (Tr. 22–23, 25, 58; GC Exhs. 2(d), 3.) At the negotiating session, Maroko reviewed the IWA's terms and the Rider, covering both economic subjects such as wages and benefits and non-economic provisions. (GC Exh. 2(c); R.S. Exh. 1.) Pascucci stated that he needed some time to fully review the Union's proposal with Troutbrook, and would contact the Union the following week regarding dates for additional negotiating sessions. (Tr. 70–71; GC Exh. 2(c); R.S. Exh. 1.)

The second negotiating session took place on June 4, 2020. In addition to Maroko and Martin, Operations Assistant Julissa Sanchez attended for HTC. Pascucci and Crespi attended for Troutbrook. (GC. Ex. 2(e); R.S. Exh. 1, p. 1.) Maroko began by asking Pascucci whether Troutbrook had reviewed and the IWA and Rider provided by the Union, and whether the Hotel had any response. Pascucci, however, suggested that the parties discuss several ground rules. Specifically, Pascucci proposed that the parties agree to forego recording negotiating sessions, to focus on non-economic issues before moving on to economic issues, to make requests for information in writing and provide responses within a reasonable time frame, and to present formal proposals in writing. Finally, Pascucci proposed that no individual issue would be considered agreed-upon until the parties had signed a tentative agreement. Maroko immediately responded that the Union wanted to discuss the entire contract without limitations, but an agreement to forego recording of sessions and put requests for information in writing would be acceptable. Maroko suggested that Pascucci provide the proposed ground rules in writing for the Union's review. (GC Exh. 2(e), p. 1; R.S. Exh. 1, p. 1.)

Pascucci then presented several "key points" in response to the IWA and Rider provided by the Union. Pascucci stated that Troutbrook was "NOT willing to accept the IWA." (R.S. Exh. 1, p. 1) (emphasis in original). Pascucci elaborated that given the differences between the hotel industry in Brooklyn and Manhattan in terms of labor market and room rates, and the impact of the COVID-19 pandemic, Troutbrook intended to negotiate a "stand-alone CBA" appropriate for "a small business with a small workforce" under "severe financial strain." Id. Thus, Troutbrook wanted a "simple streamlined contract" with "concise and plainly worded" terms in order to "avoid disputes over interpretation." (GC Exh. 2(e), p. 1; R.S. Exh. 1, p. 1.)

Maroko asked whether in describing the IWA and Rider as unacceptable Pascucci was referring to economic or non-economic issues, and Pascucci responded "all of it," characterizing the IWA's language as "way to convoluted and unnecessarily complex and burdensome." (GC Exh. 2(e), p. 1-2.)—Maroko responded that over 200 hotels, a number of which were in Brooklyn, were subject to the IWA and able to work with its language and provisions. Maroko stated, "I certainly understand if the hotel says I want to look at the economics both in terms of room rates and labor market, or there are specific work rules you want to discuss." However, Maroko described the wholesale rejection of the IWA as "a knee jerk reaction" characteristic of employers which "don't want to get a deal anyway." (GC Exh. 2(e), p. 2.) Maroko asked Pascucci why the Hotel would object to provisions such as visitation, successors and assigns, scheduling, and bulletin boards. Pascucci responded, "We can go topic-by-topic and I'm sure some things will be easy to agree," but specifically rejected the successors and assigns language. Pascucci stated that the Union had proposed a lengthy contract with detailed provisions "written for the larger industry or hotel chains." Maroko responded that signatories to the IWA included large chains such as Marriott and Hilton, but also small, independently owned hotels in Brooklyn. Maroko stated that the IWA was a "mature document," containing provisions developed over many years to accommodate hotel owners and operators and hotel workers. Maroko asserted that the work being performed by Troutbrook's bargaining unit employees was not appreciably different from the work being performed by bargaining unit employees at other hotels, so that the Troutbrook employees' terms and conditions of employment should not vary substantially from those of other hotel employees represented by the Union. Pascucci said that Maroko seemed to be describing a "one-size-fits-all" approach, and Maroko responded, "Yeah, pretty much." (GC Exh. 2(e), p. 2; R.S. Exh. 1, p. 1.)

At that point, Crespi stated that the Union's approach "Doesn't seem in good faith," and suggested that Pascucci continue with his "good faith" presentation. Maroko stated that Pascucci needn't "pretend" and "put on a show," asking "What is the issue with access and bulletin board?" Maroko suggested that Pascucci's reluctance to address such topics indicated that Troutbrook intended to merely "go through the motions." Pascucci responded that Maroko was making an assumption, and Maroko stated that he was interpreting the company's actions "in plain English." Maroko told Pascucci to make a proposal and the Union would respond. Pascucci said that plain English as opposed to convoluted language was precisely what Troutbrook was seeking. Maroko responded, "So then prove me wrong . . . If you raise issues that are legitimate, we'll be flexible . . . We'll wait and see your proposal." Pascucci stated that Troutbrook's proposal "will not be the whole contract, just some of the articles in our contract and we'll state our counterproposal." Maroko responded that "Our position is good faith requires a complete proposal . . .You should give a full proposal so we can assess the entirety of it." Pascucci countered that "When it's a first contract and you have 50 open issues on the table, it's a lot harder to make progress than 4 issues you can discuss and then move on." Pascucci stated that he would send the Union some ground rules and the parties could then set a date for another negotiating session. (GC Exh. 2(e), p. 2–3; R.S. Exh. 1, p. 1.)

Several hours after the negotiating session, Pascucci sent Martin an e-mail containing Troutbrook's "proposed groundrules" for the Union's response as follows:

> 1. There shall be no recording of any bargaining sessions whether in-person or via phone.
>
> 2. The parties will focus on non-economic subjects before turning to economic subjects.
>
> 3. Any requests for information will be in writing and the response will be provided within a reasonable timeframe.
>
> 4. All formal proposals and counterproposals will be in writing.
>
> 5. Nothing shall be considered as agreed until the parties have signed a tentative agreement on the subject.

(GC Exh. 2(g) (p. 32–33);[3] see also R.S. Ex. 1, p. 1.) Later that same day, Pascucci e-mailed to Martin "the key points that I made on behalf of the Hotel in today's conference call:"

> The Hotel is *NOT* willing to accept the IWA.
>
> The hotel industry in Brooklyn is completely different from Manhattan both in terms of the labor market and the room rates.
>
> COVID-19 has decimated the business
>
> The Hotel intends to negotiate a stand-alone CBA that reflects its own operation as a small business with a small workforce and currently under severe financial strain.
>
> The Hotel seeks a simple streamlined contract with terms that re concise and plainly worded so as to avoid any confusion and avoid disputes over interpretation.

(GC Exh. 2(f) (emphasis in original).); see also (R.S. Exh. 1, p. 1–2.)

Martin provided the Union's response the next day, June 5, 2020. In his e-mail, Martin stated that the Union accepted ground rule #1 prohibiting the recording of negotiating sessions. The Union explicitly rejected ground rule #2, regarding addressing non-economic matters prior to economic issues, stating that "we do not want to constrain the parties' capability to freely

[3] General Counsel's Exhibit 2 is paginated sequentially throughout all of its sub-paragraphs. When referring to a subparagraph of General Counsel's Exhibit 2 which is not internally paginated, page numbers in parentheses refer to the sequential page number for Exhibit 2 overall.

explore and discuss any items, such as specific proposals, terms, or conditions, during bargaining sessions." The Union similarly rejected ground rule #5, stating that it was willing to memorialize agreements, but under applicable law a party is not permitted to retreat from an agreement it has made. The Union rejected ground rule #4, requiring that proposals and counterproposals be submitted in writing, although it offered to have the parties put the proposals discussed or a summary in writing to keep everyone updated. With respect to ground rule #3, the Union agreed that responses to requests for information would be provided within a reasonable time frame, but rejected the portion of the rule regarding the presentation of information requests in writing. (GC Exh. 2(g), p. 31.) Martin stated that he anticipated receiving Troutbrook's counterproposal as well as dates for the next negotiating session. (GC Exh. 2(g), p. 30.)

On June 10, 2020, Pascucci responded to Martin, providing modified versions of ground rules #2 through #5. With respect to ground rule #2, Pascucci described the proposal as reflecting "a longstanding well-established tradition in labor relations as an orderly framework for achieving progress toward an overall collective bargaining agreement." Pascucci stated that the proposed ground rule #2 "was not intended to preclude discussion about any and all issues at any point in time." Thus, Troutbrook proposed the following modified ground rule #2: "The parties agree to focus primarily on non-economic subjects before turning to economic subjects, but it is understood that this general framework does not preclude either party from raising and freely discussing any item at any point in the bargaining process." (G.C. Ex. 2(g), p. 29.)

On June 15, 2020, Martin wrote to Pascucci, responding to Pascucci's June 10, 2020 e-mail. Martin began by expressing the Union's disappointment that Troutbrook had not provided a response to the complete contract proposal, the IWA and Rider provided by the Union on May 18, 2020, despite Pascucci's statement at the conclusion of the June 4, 2020 session that the company would provide a counterproposal covering at least some of the issues the following week. (GC Exh. 2(g), pp. 26–27).) Martin therefore asked when the Union could expect to receive a counterproposal to its complete contract proposal, as well as dates for additional negotiating sessions. (GC Exh. 2(g), p. 27.) Martin then proceeded to address the modified ground rules Pascucci had provided, stating that the Union would not agree to ground rule #2 as modified. Martin stated:

> We have proposed a complete contract, covering both economic and non-economic terms. We want to be able to bargain over all such terms without artificial timeline or constraint. We do not believe you can preclude the parties from bringing up certain subjects. The Union rejects this proposed ground rule. Let us know if you are refusing to have meaningful discussion on economics until all non-economic subjects are addressed.

(GC Exh. 2(g), p. 27.) The Union confirmed its agreement that there would be no recording of negotiating sessions and that responses to information requests would be provided within a reasonable timeframe but rejected the remainder of the ground rules as modified in Pascucci's June 10, 2020 email. (GC Exh. 2(g), p. 27–28.)

Pascucci responded in an e-mail on June 18, 2020, stating that "the Hotel is prepared to move forward without the[] additional proposed ground rules," and that Troutbrook intended to proceed with the negotiations in the following manner:

- In responding to the Union's proposals, the Hotel will focus on non-economic subjects first.
- With respect to any information requests, the Hotel will ask that those be made in writing in order to avoid any misunderstandings about what is being requested. Should the Union decline to put any requests in writing, we will take the time during bargaining to write down in our notes each request word-for-word and we will send a follow-up email asking you to confirm the accuracy of our notes.
- During bargaining the Hotel will engage in substantive discourse about the subjects being discussed, but none of our words should be viewed as a proposal or a counter proposal since my experience has been that this can lead to misunderstandings, especially when certain words are taken out of context. Instead, all of the Hotel's proposals and counter proposals will be presented in writing. If the Union decides to make a verbal proposal without presenting it in writing, we will proceed as noted above with respect to information requests.
- The Hotel still intends to enter into written tentative agreements as we move through the subjects of bargaining, and these tentative agreements will not become effective until there is an overall contract ratified by your membership. We will sign these tentative agreements and ask the Union to do the same. If the Union declines, we will send a follow-up email setting forth our understanding of the terms for agreement, and asking you to confirm the accuracy of our understanding.

(GC Exh. 2(g), p. 25–26.)

The next negotiating session took place one week later, on June 25, 2020. Martin and Operations Assistant Julissa Sanchez attended for HTC, and Pascucci and Crespi attended for Troutbrook. (GC Exh. 2(h), p. 1; R.S. Exh. 1, p. 2.) The session began with Crespi reporting on current occupancy rates, the Hotel's operations, and the recall of employees pursuant to an information request Martin had made. (G.C. Ex. 2(h), p. 1–3.) Pascucci then briefly reviewed non-economic proposals that he had just sent to Martin, including a Preamble, Recognition, No Discrimination, No Strikes or Lockouts, New Employees (probationary period), Hours of Work, and Effective Dates of the collective bargaining agreement. (GC Exh. 2(h), p. 3–4; GC Exh. 2(i).) Martin stated that the Union did not agree to address solely non-economic issues, and asked when the Union could expect to receive proposals on wages, health benefits, and retirement benefits. Pascucci responded, "Working on non-economics first, that's our plan." In addition, Pascucci stated that Troutbrook did not know "what the economics are going to be like," and could not present a proposal "until we're in a position to offer something." Pascucci stated that the Hotel was "operating according to status quo," expected to "remain at status quo for the foreseeable

future," and had not yet discussed an economic proposal. Martin renewed the Union's request for a complete proposal and explained that the bargaining unit employees had questions regarding wages, health benefits, and retirement that he needed to be able to address. Pascucci complained again regarding the length and "pattern contract" nature of the Union's proposal, and Martin explained that the Rider was specifically tailored to Troutbrook's facility, particularly in terms of vacation language and wage rates. Martin thus once again renewed the Union's request for a complete proposal. (GC Exh. 2(h), p. 4–5.)

The parties then proceeded to discuss the language in Troutbrook's proposal in further detail. Martin noted that although the Hotel's proposal was ostensibly based upon the Union's proposal pertaining to the six specific topics it encompassed, some language contained in the Union's proposal had been omitted. Martin asked whether this material was being rejected, and Pascucci responded that while the Hotel was not agreeing to the Union's proposals, its current proposals were only "a subset on these topics." Martin asked how many proposals the Hotel intended to make, and Pascucci stated that the Hotel intended to "work on these topics" until a tentative agreement was reached, and then continue to "the next set of proposals." Martin stated that he would discuss the topics contained in the Hotel's proposal but asked again for additional proposals regarding wages and health and retirement benefits.

Martin then proceeded to address the six items comprising the Hotel's proposal. Martin suggested that the parties agree to the Union's broader non-discrimination language. He then asked about the Hotel's open shop proposal, and Pascucci clarified that the provision was not intended to allow management to pressure employees with respect to whether or not to join the Union. The parties then discussed the applicability of the Hotel's proposed 6-month probationary period. During that discussion, Pascucci stated that all tentative agreements were subject to the ratification of a final agreement, and the Union could not rely upon oral representations. The parties then discussed the Hotel's Hours of Work proposal in comparison to the pertinent provision of the IWA. The session ended with Martin requesting that the Hotel provide a copy of the Hotel's existing probationary procedure which formed the basis for its proposal, and again urging the Hotel to consider providing a complete proposal encompassing all mandatory subjects of bargaining. (GC Exh. 2(h), p. 5–10.)

After the June 25, 2020 negotiating session, the parties did not meet again for bargaining until February 2, 2021. There is no dispute that this hiatus was engendered by the substantial impact of the COVID-19 pandemic on the New York City hospitality industry, including HTC's general membership and Respondent's business. (Tr. 37–38.) There is no contention that the hiatus was caused by or evinced bad faith on the part of Respondent, or that Respondent refused to meet with the Union during this period. (Tr. 46–47.)

The next negotiating session took place on February 2, 2021, with Martin and Sanchez attending for the Union and Pascucci and Director of Finance Aida Tejada attending for the Hotel. (GC Exh. 2(j), p. 1; R.S. Exh. 1, p. 2.) This session opened with a discussion between Martin, Pascucci, and Tejada regarding the status of the bargaining unit employees, including the current number of employees in each job classification, layoffs, and recall offers. Martin then stated that he had not received any additional response to the complete proposal the Union had made the previous year, and was still awaiting a proposal from the Hotel that encompassed economic issues. Pascucci stated that the Hotel intended to move through non-economic subjects in sets of six issues before addressing economic terms. (GC Exh. 2(j), p. 2–3; R.S. Exh. 1, p. 2.) In response, Martin reiterated his request for a complete proposal, stating that "piece meal" bargaining was unproductive and did not satisfy the legal standards for bargaining in good faith. Pascucci said he would discuss that position with his client. Martin suggested that even if Pascucci intended to negotiate a completely new contract he could begin with the Union's proposal, but Pascucci stated again that the Hotel was seeking easy, simple, concise language which provided a lot of flexibility. Martin stated that he was willing to bargain to establish the flexibility that would accommodate the Hotel's specific operational needs. Pascucci responded that the Union's proposal was "not reality," and that the IWA and Rider provisions were overly "restrictive and expensive." Martin stated that the provisions could be made less convoluted and the economics less expensive through negotiations, but "At some point you have to accept that your hotel is union and start negotiating." Pascucci stated that the Hotel had provided counterproposals on several articles, and Martin reiterated that it was not possible to engage in piecemeal bargaining, such as discussing the hours of work provisions without a wage proposal. Martin stated again that providing a complete proposal was a bargaining obligation and Pascucci responded, "Of course we will, it's a matter of when." (GC Exh. 2(j), p. 3–4; R.S. Ex. 1, p. 2.)

On February 5, 2021, Martin wrote to Pascucci requesting information regarding the current bargaining unit employees, including layoffs, recall offers, new hires, current employees, employees who had quit, overtime, and changes in work assignments. (GC Exh. 2(k).) In a subsequent series of e-mails, the parties scheduled the next session for March 11, 2021. In the last e-mail of this sequence, Martin asked that the Hotel "provide a complete proposal, including economics and addressing all mandatory topics." (GC Exh. 2(l).)

The next negotiating session took place on March 11, 2021, with Martin and Sanchez attending for the Union, and Pascucci and Tejada attending for the Hotel. (GC Exh. 2(m), p. 1; R.S. Exh. 1, p. 2.) The session began with a discussion of the overall state of the area hotel industry in light of current status of the COVID-19 pandemic. Tejada provided a forecast for 2021 of anticipated payroll based on projected occupancy, which the parties discussed in the context of Martin's February 5, 2021 information request. (GC Exh. 2(m), p. 1–3; R.S. Exh. 1, p. 2.)

Martin then addressed the overall status of negotiations, stating if the Hotel expressed a willingness to agree to the IWA with a Rider, he could "come up with as many deals and breaks" as possible to arrive at an overall agreement, as opposed to "continuing to slog this out." (GC Exh. 2(m), p. 4; R.S. Exh. 1, p. 2.) Pascucci reiterated that the Hotel wanted to negotiate its own contract reflecting the fact that it is a small hotel in Brooklyn, stating that the future was "questionable." Martin responded that the Union was waiting for a proposal, and Pascucci stated again that the Hotel intended to bargain regarding subsets of issues, moving onto a new group of topics after the previous group was

resolved. Martin stated that the Hotel was legally obligated to provide a complete proposal, and that at that particular stage in the negotiations refusing to provide an economic proposal did not constitute good faith bargaining. Pascucci asked for Board cases supporting Martin's position, which Martin agreed to provide, and stated that the Union was refusing to respond to the Hotel's six proposals without receiving a complete proposal. Martin asked if the Hotel had another proposal or document, and Pascucci stated that none was forthcoming at the time. Tejada then stated that the Hotel was not making full payments on its loan and could not negotiate when they did not know what would happen with its lender. The session ended with Martin stating that he would provide dates for additional negotiations by email. (GC Exh.)(m), p. 3–4; R.S. Exh. 1, p. 2–3.)

On March 30, 2021, Martin wrote to Pascucci providing dates for additional bargaining, and discussing the course of the parties' negotiations. (GC Exh. 2(n).) In this letter, Martin stated that the Hotel's failure to provide a proposal encompassing all mandatory subjects of bargaining constituted a refusal to bargain in good faith, and again demanded that the Hotel provide "a complete contract proposal, addressing all mandatory topics." (G.C. Ex. 2(n).) Pascucci responded later that day, stating that his approach to negotiations, particularly for first contracts, generally entailed resolving non-economic subjects of bargaining prior to addressing economic topics. Pascucci also asserted that the Union was refusing to bargain regarding the six proposals the Hotel had provided during the negotiations until the Hotel provided a complete proposal. Pascucci further stated that Martin had not provided legal support for his contention that refusing to provide a complete proposal constituted a failure to bargain in good faith. (GC Exh. 2(o) (p. 61–62.) On April 5, 2021, Martin responded, discussing what he contended were inaccuracies in Pascucci's March 20, 2021 e-mail and stating that as the Hotel had never identified legal support for its refusal to provide a complete proposal, the Union was not obligated to legally substantiate its own position. (GC Exh. 2(o), p. 60.)

The next and final negotiating session took place on April 21, 2021. Martin and Sanchez attended for the Union, and Pascucci and Tejada attended for the Hotel. (GC Exh. 2(p), p. 1; R.S. Exh. 1, p. 3.) Martin opened the session by asking whether now that spring had arrived the parties could reach agreement, and Tejada responded, "No." Martin then asked Pascucci about a complete proposal, and Pascucci stated, "Let's see what the Board says about conforming to your approach or not." Martin said that he did not see how he could respond without a complete proposal, and suggested that the parties discuss day-to-day business issues at the Hotel. Pascucci said that "what the future holds for this property" was still uncertain, because the Hotel might not be "sustainable" unless business conditions improved, although at that point it was "hanging on." (GC Exh. 2(p), p. 1; R.S. Exh. 1, p. 3.) The parties then discussed the current occupancy and staffing, with Martin proposing that recalls be made in seniority order, and Pascucci said that he could not commit to seniority-based recall. (GC Exh. 2, p. 1-3; R.S. Exh. 1, p. 3.) The parties reiterated their positions with respect to the mechanics of bargaining, with Pascucci questioning why the Union would not discuss individual topics without a complete proposal from the Hotel, and Martin contending that the Union needed a complete proposal including wages for meaningful bargaining to occur. Martin and Pascucci both stated that they would leave the issue at that point for the Board to decide but would remain in contact regarding issues involving the Hotel's day-to-day operations and staffing. (GC Exh. 2, p. 3; R.S. Exh. 1, p. 3.)

Decision and Analysis

The Complaint alleges that Troutbrook violated Sections 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively in good faith with HTC by its overall conduct, including the following: (a) refusing to provide comprehensive counterproposals; (b) restricting the non-economic subjects over which it would bargain; and (c) refusing to bargain regarding economic subjects until all non-economic subjects of bargaining were resolved. In his Post-Hearing Brief, General Counsel argues that Troutbrook refused to bargain in good faith by refusing to make proposals or bargain regarding economic issues until all non-economic matters had been resolved, and by limiting the non-economic subjects it was willing to address in negotiations to six topics – recognition, non-discrimination, a no-strike/no-lockout provision, new employee probation, hours of work, and effective dates of a collective bargaining agreement.[4] Troutbrook argues that its conduct was within the bounds of permissible behavior with respect to good faith collective bargaining pursuant to Section 8(a)(5).

Section 8(a)(5) of the Act provides that an employer may not "refuse to bargain collectively with the representative of [its] employees." Section 8(d) of the Act defines collective bargaining as involving a "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." The Supreme Court has stated that good-faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining agreement." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485–486 (1960); see also *NLRB v. Katz*, 369 U.S. 736, 747 (1962). The Act "does not compel any agreement whatsoever," nor does it require that the parties "contract on any specific terms." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 401–402 (1952); *NLRB v. Insurance Agents International Union*, 361 U.S. at 486. However, the parties "are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *NLRB v. Insurance Agents International Union*, 361 U.S. at 486. Thus, in describing the scope of a refusal to bargain in good faith, the Supreme Court has held that parties must refrain from conduct which "reflects a cast of mind against reaching agreement," and "is in effect a refusal to negotiate," as well as conduct which "directly obstructs or inhibits the actual process" of collective bargaining negotiations. *NLRB v. Katz*, 369 U.S. at 747.

For many years, the Board, with the approval of the federal

[4] While General Counsel asserted in his opening statement and states in his posthearing brief that the Hotel's failure to provide a complete counterproposal evinces a lack of good faith in bargaining, he provides no specific legal authority or argument based upon the record evidence in support of this contention. (GC Posthearing Br. at pp. 11–15; see also Tr. 7–8.) As a result, I will not address this issue.

appellate courts, has held that an employer's indefinite insistence on the resolution of all non-economic subjects of bargaining prior to addressing economic matters violates Sections 8(a)(1) and (5) of the Act, because such conduct inhibits the process of collective bargaining. See, e.g., *Wyman Gordon Pennsylvania, LLC*, 368 NLRB No. 150, slip op. at 3, and 14, fn. 8 (2019), enfd. 836 Fed.Appx. 1 (D.C. Cir. 2020) (Member McFerran dissenting in part) (collecting cases); *Detroit Newspapers*, 326 NLRB 700, 794 (1998), rev. on other grounds 216 F.3d 109 (D.C. Cir. 2000); see also *Crispus Attucks Children's Center*, 299 NLRB 815, 837 (1990); *Eastern Maine Medical Center*, 253 NLRB 224, 245 (1980), enfd. 658 F.2d 1 (1st Cir. 1981); *Patent Trader*, 167 NLRB 842, 853 (1967), enfd. in relevant part 415 F.2d 190 (2d Cir. 1969), modified on other grounds 426 F.2d 791 (1970 (en banc)). This doctrine is based upon an understanding that the mechanics of productive collective bargaining require the "exchange of views on all mandatory bargaining subjects." *Patent Trader*, 167 NLRB at 853. The Board has repeatedly explained that the "give and take" of legitimate, good-faith bargaining necessarily encompasses the consideration of multiple proposals simultaneously, even proposals which may not be facially or conceptually related to one another. See, e.g., *Cal-Pacific Furniture Mfg. Co.*, 228 NLRB 1337, 1341 (1977), enf. denied on other grounds 580 F.2d 942 (9th Cir. 1978) (quoting *Korn Industries, Inc. v. NLRB*, 389 F.2d 117, 121 (4th Cir. 1967) ("Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas"); *Rhodes-Holland Chevrolet Co.*, 146 NLRB 1304, 1316 (1964) (noting the frequent "interrelation, as a practical matter, between clauses which, on their face, deal with entirely different subjects" such that "agreement is often reached because one party gives something in one area and the other is therefore willing to modify or withdraw its demand with respect to an apparently unrelated subject").[5] Thus, the Board has found that in the pragmatic context of collective bargaining negotiations, an employer's "insistence on refusing to discuss and submit counterproposals on economic matters until all non-economic items [are] resolved constitutes persuasive evidence of intent not to reach agreement." *Patent Trader*, 167 NLRB at 853. In *Patent Trader*, the Board stated that by "postponing…to the very end of negotiations…the most fundamental terms and conditions of employment (wages, hours of work, overtime, severance pay, reporting pay, holidays, vacations, sick leave, welfare and pensions, etc.), [the employer] reduced the flexibility of collective bargaining, narrowed the range of possible compromises, and 'cut off' the 'infinite opportunities for bargaining.'" 167 NLRB at 853, quoting *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 223, 225 (1949); see also *NLRB v. Patent Trader, Inc.*, 415 F.2d at 198; and see *South Shore Hospital*, 245 NLRB 848, 858 (1979), enfd. 630 F.2d 40 (1st Cir. 1980).

The record evidence in the instant case establishes that Troutbrook fell short of its duty to bargain in good faith for precisely this reason, impeding the negotiating process in the manner discussed above. Immediately prior to the initial negotiating session on May 18, 2020, HTC provided the Hotel with a comprehensive proposal – encompassing all economic and non-economic terms – in the form of the IWA and a proposed Rider specifically modifying the IWA's terms to apply to Troutbrook. The Rider included economic subjects such as wages, health and pension benefits, vacation and other forms of paid leave, and the IWA contained additional economic provisions addressing subjects such as overtime, premium pay and shift differentials, holidays, severance pay, and a 401(k) plan. (GC Exhs. 2(d), 3.)

Troutbrook rejected this proposal in its entirety at the second session on June 4, 2020. The Hotel then pursued an explicit strategy of addressing non-economic issues prior to fundamental economic matters such as wages and benefits. During that session, Pascucci proposed several "ground rules," including focusing on non-economic issues prior to addressing economic issues. Several hours after the session ended, Pascucci sent Martin the Hotel's proposed ground rules in writing, including, "The parties will focus on non-economic subjects before turning to economic subjects." When Martin unequivocally rejected that rule, Pascucci modified it to propose that "The parties agree to focus primarily on non-economic subjects before turning to economic subjects, but it is understood that this general framework does not preclude either party from raising and freely discussing any item at any point in the bargaining process." When Martin rejected this formulation of the rule as well, Pascucci announced Troutbrook's intention to proceed with negotiations as follows: "In responding to the Union's proposals, the Hotel will focus on non-economic subjects first."

Troutbrook proceeded in this manner throughout the remainder of the negotiations, ultimately demonstrating an insistence on resolving non-economic subjects of bargaining before economic issues would be addressed. After Troutbrook rejected the IWA and Rider at during the second negotiating session on Jun 4, 2020, the Union immediately requested a complete counterproposal, reiterating this request in Martin's June 5 and June 15, 2020 emails. However, at the next session, on June 25, 2020, Troutbrook presented a proposal covering only six non-economic subjects of bargaining—Preamble, Recognition, No Distrimination, No Strikes or Lockouts, New Employees (probationary period), Hour of Work, and Effective Dates of a contract. HTC requested again that the Hotel provide proposals regarding wages and benefits, but the Hotel declined to do so. Thus, the first month of bargaining involved the Union's providing a comprehensive proposal covering all subjects of bargaining, and the Hotel's providing a counterproposal consisting of only six non-economic subjects. In the face of the Union's repeated requests for a comprehensive proposal including economics, the Hotel took the position that "Working on noneconomics first, that's our plan."

Nor did the Hotel provide any proposal including economic

[5] Pascucci acknowledged this dynamic in his discussions with the Union during negotiations, stating that in his experience "some difficult non-economic items . . . would be left open," and when parties discussed economic issues, "they would often make deals and trade things, and that's how you get to a contract ultimately." (Tr. 54.) Martin did as well, repeatedly stating that the Union needed a complete proposal to determine the impact of its different components on one another, to evaluate each component of the contract in an overall context, and to work with the bargaining unit employees to reach an overall agreement. (GC Exh. 2(j), p. 3–4; GC Exh. 2(p), p. 3.)

subjects during the 3 months of bargaining beginning on February 2, 2021. All of these sessions—which took place on February 2, 2021, March 11, 2021, and April 21, 2021—were characterized by HTC's request for a complete proposal including economic issues, and the Hotel's refusal to discuss anything other than the six non-economic proposals it had presented the previous year. Nor did Troutbrook provide any economic proposals in response to Martin's written requests for a complete proposal including economic subjects of bargaining on March 8 and March 30, 2021, and on April 5, 2021. Thus, for the entire process of bargaining—4 months of actual negotiations and a six-month hiatus necessitated by the circumstances engendered by the COVID-19 pandemic—Troutbrook refused to provide any proposal whatsoever involving "the most fundamental terms and conditions of employment." *Patent Trader*, 167 NLRB at 853. Moreover, Pascucci's statements in response to the Union's demand for a complete proposal—such as "Working on non-economics first, that's our plan" (June 25, 2020) and "Ratification process is when all comes together" (April 21, 2021) – conveyed that the Hotel did not intend to engage with the Union regarding economic issues until "the very end of negotiations." *Patent Trader*, 157 NLRB at 853; see GC Exh. 2(p), p. 3. Troutbrook's refusal to provide any proposal involving economic terms in such circumstances evinced an intent to frustrate agreement, and constitutes a violation of Section 8(a)(5) under the pertinent caselaw.[6] See *Sunbelt Rentals, Inc.*, 370 NLRB No. 102 , slip op. at 3 (2021) (refusal to provide a wage counterproposal for four months violated Section 8(a)(5)); *Kalthia Group Hotels*, 366 NLRB No. 118, slip op. at 18 (2018) (3-1/2-month delay in providing counterproposals regarding wages and healthcare indicative of bad-faith bargaining); *Adrian Daily Telegram*, 214 NLRB 1103, 1111–1112 (1974) (refusal to make an economic counterproposal for at least 4 months following union and mediator's requests violated Sec. 8(a)(5)).

Troutbrook further contends that its insistence on addressing non-economic issues prior to negotiating regarding economic terms and conditions of employment was justified given that the negotiations involved an initial collective bargaining agreement between the parties. Pascucci testified based upon his experience that in collective bargaining involving a first contract, language is often negotiated first, with economic terms introduced into the discussions after the majority of the non-economic matters have been resolved. (Tr. 68–70.) Martin testified that he was also aware of such an approach in first contract situations. (Tr. 50-51.) However, Troutbrook does not provide any legal authority in support of the proposition that a first contract situation somehow exempts an employer from the general rule that insisting upon negotiating non-economic issues prior to addressing economic terms undermines productive bargaining such that it constitutes a violation of Section 8(a)(5). To the contrary, this principle was specifically developed and has been consistently applied in the context of negotiations between an employer and a newly-certified union for an initial collective bargaining agreement. See *Rhodes-Holland Chevrolet Co.*, 146 NLRB at 1305, 1306–1307, 1316–1317 (noting that "By insisting that non-money matters be settled before cost items were even discussed, the Company put the Union in the position of being unable to make significant concession in these areas as a *quid pro quo*…for a wage increase"); *Patent Trader*, 167 NLRB at 842; *Adrian Daily Telegram*, 214 NLRB at 1110–-1112; *Crispus Attucks Children's Center*, 299 NLRB at 817; *Sunbelt Rentals, Inc.*, 370 NLRB No. 102, slip op. at 1. Indeed, it is consistent with the policy underlying presumptive majority status during the "certification year"—to provide a newly certified union with "ample time for carrying out the mandate of its members" without "exigent pressures to produce hothouse results or be turned out." *Chelsea Industries*, 331 NLRB 1648, 1649 (2000), enfd. 285 F.3d 1073 (D.C. Cir. 2002), quoting *Brooks v. NLRB*, 348 U.S. 96, 100 (1954). As the Supreme Court stated in *Brooks v. NLRB*, "It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties." 348 U.S. at 100; see also *Kalthia Group Hotels*, 366 NLRB No. 118, slip op. at 18, quoting *J.P. Stevens & Co.*, 239 NLRB 738, 765 (1978), enfd. in relevant part 623 F.2d 322 (4th Cir. 1980) ("It is manifestly detrimental to the Union's preservation of employee support to delay the submission of proposals").

Furthermore, the evidence does not establish any mutual agreement between the Hotel and the Union to address non-economic issues before turning to economic matters. HTC immediately objected to the Hotel's proposed ground rule providing that the parties focus on non-economic issues prior to addressing economic provisions, rejected the Hotel's proposed modification of this ground rule, and repeatedly reiterated its demand for a proposal addressing economic issues both at negotiating sessions and in correspondence. In response, the Hotel asserted that "In responding to the Union's proposals, the Hotel will focus on non-economic subjects first," and at negotiations Pascucci stated, "Working on non-economics first, that's our plan . . . I get that it's not your preference." Because the Union never agreed to address non-economic proposals prior to negotiating regarding economic issues, *Wyman Gordon Pennsylvania, LLC*, cited by Troutbrook, is inapposite here. 368 NLRB No. 150, slip op. at 2, 3, 5 (employer did not violate Section 8(a)(5) by "insisting indefinitely . . . on continuing to negotiate non-economic subjects before discussing economic subjects" given parties' "explicit agreement" in ground rules to "discuss non-economic proposals before economic proposals"); see *Sunbelt Rentals, Inc.*, 370 NLRB No. 102, slip op. at 3 (distinguishing *Wyman Gordon Pennsylvania, LLC* on this basis).[7] In addition, the evidence does

[6] Troutbrook argues that it did not insist on the negotiation of non-economic issues before addressing economic subjects in a manner which evinced an intent to frustrate agreement because it did not use the word "all" when referring to the quantum of non-economic subjects it wished to resolve before it would begin to address economic matters. (R.S. Posthearing Br. at 17; Tr. 50.) Given the course of negotiations and the caselaw discussed herein, that argument is not persuasive.

[7] Troutbrook also argues that *Wyman Gordon Pennsylvania, LLC* requires dismissal of the Complaint in the instant case, and that *Sunbelt Rentals, Inc.* is inapposite, because there are no allegations here that Troutbrook committed other unfair labor practices. *Sunbelt Rentals, Inc.*, 370 NLRB No. 102, slip op. at 5. While evidence of other independent unfair labor practices may be relevant to a determination that an employer refused to bargain in good faith in violation of Sec. 8(a)(5), such

not establish, as it did in *Wyman Gordon Pennsylvania, LLC*, that the parties made progress regarding non-economic issues while a discussion of economic terms and conditions of employment was held in abeyance, by mutual agreement or otherwise. 368 NLRB No. 150, slip op. at 4–5 (parties continued to discuss and exchange proposals, "still making progress toward agreement" regarding outstanding non-economic issues when employer rebuffed the union's demand to discuss economic provisions).

For all of the foregoing reasons, the evidence establishes that Troutbrook indefinitely insisted on the resolution of all non-economic subjects of bargaining prior to addressing economic matters, thereby inhibiting the process of collective bargaining, and evincing an intent to frustrate agreement.

The record also establishes that Troutbrook refused to bargain in good faith by limiting the non-economic topics it was willing to discuss with HTC during the negotiations to six issues which it unilaterally chose. The Board has repeatedly found that a party's restrictions on subjects which it is willing to address in negotiations undermines the inherent "give and take" of the collective bargaining process in a manner which frustrates an overall agreement. See, e.g., *T-Mobile USA, Inc.*, 365 NLRB No. 23 at p. 2 (2017) (employer which "unilaterally removes certain bargaining subjects from negotiation…destabilizes the bargaining process"); *E.I. Dupont*, 304 NLRB 792, fn. 1 (1991) ("It is well settled that the statutory purpose of requiring good-faith bargaining would be frustrated if parties were permitted, or indeed required, to engage in piecemeal bargaining"); see also *Cal-Pacific Furniture Mfg. Co.*, 228 NLRB at 1341; *Rhodes-Holland Chevrolet Co.*, 146 NLRB at 1316.

Here, in addition to indefinitely postponing bargaining regarding economic subjects, Troutbrook restricted negotiations regarding non-economic issues to six topics that it unilaterally chose – Preamble, Recognition, No Distrimination, No Strikes or Lockouts, New Employees (probationary period), Hour of Work, and Effective Dates of a contract – during the entire four-month period of negotiations. The Hotel's proposal comprised of these six issues was initially presented at the June 25, 2020 meeting, with Pascucci stating that Troutbrook's intention was to "work on these topics," and only "move on to the next set of proposals" once a tentative agreement was reached. (GC Exh. 2(h), p. 5.) While the Union responded by requesting a complete proposal including "the holy trinity of economics," HTC also reviewed and discussed Troutbrook's six proposals in detail during that session. (GC Exh. 2(h), p. 3–4, 5–9.) At the next session on February 2, 2021, when the Union again requested a complete proposal including economics, Pascucci responded that Troutbrook intended to "first work through non economics, get through a half dozen and resolve and then move on to next sets." GC Exh. 2(j), p. 2. Martin responded by emphasizing the Union's flexibility with respect to both language and economics, specifically stating that "When it comes to flexibility, we can bargain flexibility. We should change the IWA for your operational needs." Martin further offered to "bargain over [language] and talk about it so you don't think it's more convoluted than it is or we can bargain over things to make them less expensive." Pascucci responded that "Of course" Troutbrook would provide a complete proposal, "it's a matter of when." (GC Exh. 2(j), p. 3–4. However, Troutbrook never subsequently provided any additional non-economic proposals, ostensibly because the six proposals it had presented the previous year had not been resolved. The Board has determined that such "piecemeal" negotiations undermine the bargaining process and evince an intent to frustrate ultimate agreement. See *Whitehall Corp.*, 357 NLRB 1119, 1179 (2011) ("Insistence on this type of 'piecemeal' bargaining, in which a party demands that certain issues be resolved before any others may be considered, is indicative of bad-faith bargaining"); see also *Pillowtex Corp.* 241 NLRB 40, 47, 49 (1979), enf'd. 615 F.2d 917 (5th Cir. 1980) (insistence on resolution of non-economic issues before addressing economic subjects "fragmented" the bargaining process).

Finally, Troutbrook contends that the Union engaged in bad-faith bargaining, specifically that the Union made a "pretextual and unlawful demand" for a complete proposal, which "frustrated and derailed the bargaining process." (R.S. Posthearing Br. at 18.) However, the record establishes that the Union repeatedly expressed a willingness to work with the Hotel regarding both economic subjects and the language of a collective bargaining agreement. Martin's comments at the February 2, 2021 session, described above, indicated that the Union was willing to modify the IWA it had proposed to accommodate the Hotel's concerns, both in terms of contract language and wages, benefits and other economic terms. At the following session, on March 11, 2021, Martin made a similar overture, stating that "If at any time you want to put on your deal-making hat, I can come up with as many deals and breaks to come up with a deal. I want to make it work . . ." (GC Exh. 2(m), p. 4.) Thus, the Union repeatedly indicated while requesting a complete proposal that it was willing to negotiate not only economic subjects but also language in order to attempt to accommodate the Hotel's concerns. As a result, the record does not establish that the Union's desire to address the core economics inherent in the employment relationship simultaneously with non-economic issues detrimentally affected negotiations. Furthermore, the Complaint contains no allegations that HTC violated the Act, and there is no evidence in the record that Troutbrook filed an unfair labor practice charge alleging that the Union's conduct was somehow unlawful. Finally, it is well-settled that there is no equitable defense of unclean hands cognizable under the Act, as Board proceedings are instituted in the public interest to effectuate statutory policy, as opposed to vindicating private rights. See, e.g., *Décor Group, Inc.*, 356 NLRB 1391, 1395 (2011); *California Gas Transport, Inc.*, 347 NLRB 1314, 1326, fn. 36 (2006), enfd. 507 F.3d 847 (5th Cir. 2007).

For all of the foregoing reasons, the evidence establishes that in the course of its negotiations with HTC, Troutbrook indefinitely insisted on the resolution of non-economic subjects of bargaining before addressing economic subjects, and restricted bargaining to six non-economic subjects which it unilaterally chose. Because such conduct evinces an intent to frustrate agreement, the evidence establishes that Troutbrook failed and refused to

a finding may be based upon the parties' course of conduct pertaining to negotiations alone.

negotiate in good faith with HTC, in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent Troutbrook Company, LLC d/b/a Brooklyn 181 Hospitality, LLC is an employer engaged in commerce at its 181 3rd Avenue, Brooklyn, New York facility within the meaning of Section 2(2), (6), and (7) of the Act.

2. New York Hotel and Motel Trades Council, AFL–CIO ("HTC") is a labor organization within the meaning of Section 2(5) of the Act.

3. Since September 24, 2018, HTC has been the certified collective bargaining representative of Respondent's full-time and regular part-time front-desk employees, housemen/bellmen, housekeepers, laundry attendants and food and beverage employees employed by the Employer at 181 3rd Avenue, Brooklyn, New York, excluding executive management, sales personnel, fire safety directors, all other employees including guards and supervisors, as defined by the National Labor Relations Act.

4. Respondent failed and refused to bargain in good faith with HTC by indefinitely insisting on the negotiation of non-economic issues prior to addressing mandatory economic subjects of bargaining, and by restricting bargaining to six non-economic proposals it unilaterally selected, thereby undermining the collective bargaining process and frustrating progress toward an overall agreement, in violation of Sections 8(a)(1) and (5) of the Act.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and take certain affirmative action designed to effectuate the Act's policies. Specifically, having found that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain in good faith, I shall order Respondent to meet with the Union upon request and bargain in good faith concerning the terms and conditions of employment of the bargaining unit employees and, if an agreement is reached, embody such agreement in a signed contract.[9] I shall further order Respondent to post and disseminate an appropriate notice.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[10]

ORDER

Troutbrook Company, LLC d/b/a Brooklyn 181 Hospitality, LLC, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the New York Hotel and Motel Trades Council, AFL-CIO, as the exclusive collective bargaining representative of the employees in the bargaining unit, by refusing to bargain indefinitely regarding economic subjects until non-economic issues are resolved and by restricting bargaining to six non-economic proposals that it has unilaterally selected.

(b) 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 collectively and in good faith 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 regular part-time front-desk employees, housemen/ bellmen, housekeepers, laundry attendants and food and beverage employees employed by the Employer at 181 3rd Avenue, Brooklyn, New York, excluding executive management, sales personnel, fire safety directors, all other employees including guards and supervisors, as defined by the National Labor Relations Act.

(b) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, 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. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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. If Respondent has gone out of business or closed the Brooklyn, New York facility, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since April 22, 2020.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. December 1, 2021

APPENDIX A

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.

[9] General Counsel does not request any extension of the certification year pursuant to *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

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

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 refuse to bargain in good faith with the New York Hotel and Motel Trades Council, AFL–CIO, by indefinitely refusing to bargain about economic subjects until non-economic issues are resolved and by restricting bargaining to six non-economic proposals that we unilaterally select.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, at the Union's request, bargain with the Union in good faith 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 regular part-time front-desk employees, housemen/ bellmen, housekeepers, laundry attendants and food and beverage employees employed by the Employer at 181 3rd Avenue, Brooklyn, New York, excluding executive management, sales personnel, fire safety directors, all other employees including guards and supervisors, as defined by the National Labor Relations Act.

TROUTBROOK COMPANY, LLC D/B/A BROOKLYN 181 HOSPITALITY, LLC

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/29-CA-275229 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.