

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

5-CA-34837

and

5-CA-35014

5-CA-35244

5-CA-35419

UNION OF ALPA PROFESSIONAL AND ADMINISTRATIVE

EXCEPTIONS OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the Respondent, the Air Line Pilots Association, International (“ALPA”) makes the following exceptions to the February 15, 2011 decision of Administrative Law Judge Bruce Rosenstein:¹

A. **BACKGROUND**

1. ALPA excepts the finding that the most recent collective bargaining agreement (“CBA”) was effective from April 1, 2008 to March 31, 2009. (ALJD 3:1-3). The most recent CBA was effective April 1, 2004 through March 31, 2009. It consisted of two components, the 2004-2008 agreement and a one year extension, with modifications, through March 31, 2009. R. Exh. 1; R. Exh. 14; GC Exh. 42. Discussed ALPA Brief at “Background Facts.I.”²
2. ALPA excepts the finding that the airline industry’s current financial hardship is a new phenomenon and, consequently, required a dramatically different response than

¹ ALPA abbreviates references to the February 15, 2011 decision (the administrative law judge’s decision, or “ALJD”) as (page:line). ALPA abbreviates references to our accompanying Brief in Support of Exceptions as “ALPA Brief.” Unless otherwise noted, all citations to the Brief are to the “Argument” section.

² Citations to the record may be found in the brief accompanying these exceptions.

previous economic challenges. (3:5-14). The airline industry has always been cyclical, Tr. 345:3-7, and Unit 1 and ALPA's long-standing relationship and CBAs have been premised on a mutual understanding that ALPA needs flexibility to respond to the industry's ups and downs. ALPA Brief at Parts I, I.B, C.2.

3. ALPA excepts the ALJD's failure to find that, in connection with bargaining a successor agreement to the 2004-09 CBA, ALPA and Unit 1 met at least twenty-five times, for over 100 hours, over the course of approximately four months. Discussed ALPA Brief at Part IV.

B. REFUSAL TO PROVIDE INFORMATION

4. ALPA excepts the ALJD's finding that ALPA violated Sections 8(a)(1) and (5) of the NLRA by not providing Unit 1's requested information or by not timely providing it. (5:28-29). Even if ALPA had a duty to provide information about the layoffs, ALPA provided all the information it was statutorily required to provide. See ALPA Brief at Part IV.
5. ALPA excepts the implied finding that ALPA had a duty to bargain mid-contract with Unit 1 over the decision to engage in layoffs or job abolishments, or a duty to bargain mid-contract over the effects of any layoffs or job abolishments that occurred during the term of the collective bargaining agreement. (4:1-5:29). See ALPA Brief at Part IV.
6. ALPA excepts the ALJD's failure to find that ALPA gave legally sufficient notice to Unit 1 of the layoffs which were announced in January and February, 2009. See Brief at Background facts II.B; ALPA Brief at Part III.

7. ALPA excepts the finding that ALPA did not provide the names, positions, and effective dates of the Herndon eliminations to Unit 1 until January 13, 2009. (4:26-29). ALPA provided this information to Unit 1 on the date the employees were laid off. ALPA Brief at Background Facts II.B.
8. ALPA excepts the ALJD's failure to find that, in January and February, 2009, ALPA explained to Unit 1 how it selected individuals for reductions in force. See ALPA Brief at Part II.2.
9. ALPA excepts the ALJD's failure to find that ALPA offered to inform Unit 1 of the names of the employees to be laid off in Minneapolis if Unit 1 would keep the names confidential, and that Unit 1 refused to agree to confidentiality. See ALPA Brief at Part II.2.
10. ALPA excepts the ALJD's finding that Unit 1's requests for information were relevant to Unit 1 in fulfilling its statutory duties as the employees' exclusive bargaining representative of Unit 1 members. (ALJD 4:40-41, 47-50; 5:15-18). See ALPA Brief at Part III.
11. ALPA excepts the ALJD's finding that Klocke and Iverson credibly testified that the information requested in the January 5, 2009 letter and January 7, 2009 conversation was not provided to Unit 1 until meaningfully after the Herndon job abolishments occurred. (ALJD 5:20-22). The information about which positions would be eliminated, the affected employees, and the effective date of the elimination was provided to Unit 1 the same day the employees were notified. See ALPA Brief at Part III.

12. ALPA excepts the ALJD's finding that the information requested orally on February 9, 2009 and by letter on January 13, 2009 was not provided to Unit 1. (ALJD 5:22-23). The information about which positions would be eliminated, the affected employees, and the effective date of the elimination was provided to Unit 1 the same day the affected employees were notified. Additionally, ALPA informed Unit 1 of the criteria for selecting which positions to eliminate prior to eliminating the positions. *See* ALPA Brief at Background Facts II.B; ALPA Brief at Part III.2
13. ALPA excepts the ALJD's finding that Collie did not dispute the assertions that ALPA refused to provide Unit 1 with ALPA's "method" for selecting who would be laid off and that she admitted the same. (ALJD 5:24-26). Collie testified that ALPA clarified for Unit 1 that the process to determine which positions would be eliminated was a discretionary process, and that there existed no list of criteria. *See* ALPA Brief at Part III.2.
14. ALPA excepts the ALJD's failure to find that ALPA complied with any statutory duty to provide information when it responded to Unit 1's request for information concerning which employees would be laid off on the same date that the employees were notified. *See* ALPA Brief at Part III.
15. ALPA excepts the ALJD's failure to find that the Act imposes no obligation on ALPA to provide Unit 1 with the specific names of the employees being considered for layoff. *See* ALPA Brief at III.
16. ALPA excepts the ALJD's failure to find that Unit 1 understood ALPA's discretionary method for selecting which employees to lay off. *See* ALPA Brief at III.3.

17. ALPA excepts the ALJD's failure to find that Unit 1 received all the information it needed to formulate counterproposals regarding lay offs or job security. See ALPA Brief at III.

C. REFUSAL TO BARGAIN OVER LAYOFF OF UNIT 1 EMPLOYEES

18. ALPA excepts the ALJD's finding that ALPA violated Sections 8(a)(1) and (5) of the Act in refusing to bargain over the decision to layoff employees in 2009 and the effects of those layoffs. (ALJD 9:19-22).

19. ALPA excepts the finding that the contract referred to at 5:41-45 ran from January 1 through December 31, 1990. It ran from January 1, 1979 through December 31, 1980. R. Exh. 18.

20. ALPA excepts the finding that Section 11's severance pay provisions were in effect from January 1, 1996 through March 31, 2008, with a one year extension through March 31, 2009. (5:49-6:4). Section 11's severance pay provisions were included in collective bargaining agreements since at 1996. In successive contracts, Section 11 was amended as a result of negotiations between ALPA and Unit 1 to make those severance pay provisions more generous to employees. See GC Exh. 42 (2004-2009); R. Exh. 13 (2000-2004); R. Exh. 10 (1996-1999) R. Exh. 8 (1992-1995).

21. ALPA excepts the finding that Collie and Johnson admitted that Unit 1 never explicitly waived its right to negotiate over job abolishments or intentionally relinquished its right to bargain on the subject. (ALJD 6:15-18, 9:15-17). While Collie and Johnson testified that Section 11 does not contain an express waiver and that Unit 1 never expressly stated that they waived their rights, it is ALPA's position that Section 11, as interpreted in light of the past practice and bargaining history

- between ALPA and Unit 1, confirms that Unit 1 did waive their rights to bargain mid-contract concerning layoffs and the effects of those layoffs. ALPA Brief at Part I.
22. ALPA excepts the finding that it laid off 16 employees represented by Unit 1 between May and September 2008. (ALJD 6:44-45) ALPA laid off 15 employees represented by Unit 1 between May and September 2008. R. Exh. 22.
23. ALPA excepts the ALJD's finding that ALPA did not timely notify Unit 1 of the Herndon layoffs. (ALJD 6 n.7:50-7 n.7:49). ALPA notified Unit 1 of the identities of the Herndon employees to be laid off within one day of Unit 1's request. Tr. 91:21-22.
24. ALPA excepts the ALJD's finding that the majority of the Herndon layoffs were separated the same day that ALPA notified that they were to be laid off. (ALJD 6 n.7:50-7 n.7:49, 15:41-42) ALPA gave three of the five Herndon employees one month's notice before the effective date of their layoffs. R. Exh. 17.
25. ALPA excepts the ALJ's failure to find that the effective dates the job abolishments discussed on page 7, lines 3 to 9, varied, up to months after ALPA informed Unit 1 and the employees of the layoffs. R. Exh. 17.
26. ALPA excepts the ALJD's finding that Unit 1 independently requested that ALPA negotiate over a layoff decision or its effects prior to 2009. (7:29-31). Unit 1 never requested that ALPA negotiate over layoff decisions or effects prior to 2009. See ALPA Brief at Parts I.A, B, C.
27. ALPA excepts the ALJD's finding that a waiver of a right to bargain requires "clear and unmistakable" contract language. (8:10-11). While a waiver of a right to bargain

- must be “clear and unmistakable,” the evidence supporting a “clear and unmistakable” waiver can include the parties’ past practices or bargaining.
28. ALPA excepts ALJD’s the finding that the facts of Teamsters Local Union No. 71, 331 NLRB 152 (2000), are “strikingly similar” to the facts of this case. (8:20-21). Teamsters Local Union No. 71 is addressed entirely to whether contract language expressly waived the union’s rights, whereas this case is about whether contract language, interpreted in light of past practices or bargaining history, waived the union’s rights.
29. ALPA excepts the ALJD’s applications of Teamsters Local Union, 331 NLRB 152 (2000), and New York Mirror, 155 NLRB 834, 840 (1965), to this case. (8:20-29, 9:11-13). Neither case included an issue of past practice or collective bargaining history. Moreover, in New York Mirror, the Board would have remanded the case to the ALJ for the ALJ to make factual findings concerning the parties’ bargaining history as a mean to interpret the collective bargaining agreement.
30. ALPA excepts the ALJD’s implied finding that the language of Unit 2’s collective bargaining agreement is relevant to determining whether Unit 1 waived its right to bargain over layoffs or the effects of those layoffs. (8:31-36) See ALPA Brief Part I.C.
31. ALPA excepts the ALJD’s finding that the difference between Unit 1’s Recall/Rehire and Severance Pay clause and Unit 2’s similar section is or was “stark.” (8:34).
32. ALPA excepts the ALJD’s implied finding that anything in ALPA’s proposed “management rights clause” was necessarily new to the contract. (ALJD 8:38-39) The “management rights clause” reiterated rights already found in the contract, such

- as the right to discipline, suspend, or terminate employees for just cause found in Section 8 of the 1992-1995 collective bargaining agreement. GC Exh. 63; R. Exh. 8 at ALPA 261.
33. ALPA excepts the ALJD's finding that Section 11 of the collective bargaining agreement contains "significant limitations" on ALPA's discretion to engage in a reduction in force. (ALJD 9:5-6). Section 11 does not limit ALPA discretion to abolish jobs or conduct a reduction in force. See ALPA Brief at Parts I.A, B, C.
34. ALPA excepts the ALJD's finding that ALPA was aware that Section 11 of the collective bargaining agreement contains "significant limitations" on ALPA's discretion to engage in a reduction in force (ALJD 9:5-6). ALPA has never been aware of any such limitations. See ALPA Brief at Parts I.A, B, C.
35. ALPA excepts the ALJD's finding that James Johnson admitted that there was nothing in the parties' 2004-2009 contract that provides ALPA with the absolute discretion to conduct job abolishments/RIFs. (ALJD 9:7-9) Johnson repeatedly stated that ALPA had "absolute discretion" to impose a reduction in force. Tr. 376:8-17; 444:4-7.
36. ALPA excepts the ALJD's finding that it argued that Section 8 of the 1992-1995 Unit 1-ALPA CBA (R. Exh. 8) was equivalent to a management rights clause. (9 n.11:39-40). ALPA argued that the so-called "management rights" clause proposed in 1996, in part, reiterated rights expressly set out elsewhere in the 1992-1995 CBA, including Section 8 of that CBA. See ALPA Post-Hearing Brief at 42 n.24.

37. ALPA excepts the ALJD's finding that ALPA argued that Section 11 contains a clear and unmistakable waiver expressed *in haec verba*. (9:13-15) See ALPA Post-Hearing Brief at 36.
38. ALPA excepts the ALJD's finding that Patrick Brennaman credibly testified, consistent with his self-declared "bargaining notes," GC Exh. 78, that ALPA negotiated over the decision and effects of the 1994-95 job abolishments. (ALJD 9 n.12:43-47). See ALPA Brief at Part I.B.2.
39. ALPA excepts the ALJD's finding that the discussions about the consequences of closing the print shop in 2004 constituted collective bargaining negotiations over the decision to layoff employees or the effects thereof. (9 n.12:47-49). See ALPA Brief at Part I.B.2.
40. ALPA excepts the ALJD's finding that the print shop closing and the 1994-1995 layoffs establish that ALPA lacked a consistent and established past practice of not engaging in collective bargaining negotiations with Unit 1 over the decision and effects of job abolishments/layoffs. (9 n.12:50-51). See ALPA Brief at Part I.B.2.
41. ALPA excepts the ALJD's finding that its reliance on California Pacific Medical Center, 337 NLRB 910 (2002) is misplaced because California Pacific Medical Center applies only where contract language gives the employer, *in haec verba*, the right to lay off employees or make job changes. (9:24-35) California Medical Pacific Center also stands for the principle that a waiver of the right to bargain can also be found through an examination of whether the parties' past practice of laying off employees without bargaining authorizes the employer to lay off employees or make job changes. See ALPA Brief at Part I.B.3.

42. ALPA excepts the finding that because California Pacific Medical Center, decided in 2002, did not mention Owens-Corning Fiberglass, decided in 1987, the decision in California Pacific Medical Center is inapplicable to this case. (9:32-35). See ALPA Brief at Part I.B.3.
43. ALPA excepts the ALJD's failure to find that past practice and bargaining history are relevant factors in determining whether Unit 1 clearly and unmistakably waived any right to bargain mid-contract concerning ALPA's decisions to abolish positions and lay off Unit 1 members and the effects of that decision. See ALPA Brief at Part I.
44. ALPA excepts the ALJD's failure to find that, through bargaining and as demonstrated by past practice, Unit 1 and ALPA fully discussed and consciously explored Unit 1's waiver of its right to bargain mid-contract over layoffs and their effects. See ALPA Brief at Part I.
45. ALPA excepts the ALJD's failure to find that Unit 1 consciously relinquished any right to bargain mid-term concerning layoffs and the effects of those layoffs. See ALPA Brief at Part I.
46. ALPA excepts the ALJD's failure to find that Unit 1's uniform past practice of not demanding bargaining in response to economic layoffs demonstrates Unit 1's waiver of its right to bargain mid-term over layoffs and their effects. See ALPA Brief at Part I.
47. ALPA excepts the ALJD's failure to find that ALPA's reductions in force in 1994, 2002, 2003, or 2008 occurred under similar circumstances as the 2009 reduction in force. See ALPA Brief at Part I.

48. ALPA excepts the ALJD's failure to find that Unit 1 did not demand to bargain with ALPA concerning layoffs implemented by ALPA in 1994, 2002, 2003, or 2008, nor sought to bargain with ALPA over the effects of those layoffs. See ALPA Brief at Part I.
49. ALPA excepts the ALJD's failure to find that Unit 1 believed that it had no right to bargain over the layoffs in 1994, 2002, 2003, and 2008 or the effects of those layoffs. See ALPA Brief at Part I.
50. ALPA excepts the ALJD's failure to find that the parties' past practice and bargaining history, from 1985 to the present, demonstrates that Unit 1 waived its right to mid-term bargaining over layoffs and their effects in exchange for increasingly generous severance (subsequently severance and recall) provisions embodied in Section 11 (and previously in Section 10) of the collective bargaining agreements. See ALPA Brief at Part I.
51. ALPA excepts the ALJD's failure to find that the 1995-1996, 2004, and 2008 rounds of bargaining took place either in the wake of layoffs or in anticipation of future layoffs. See ALPA Brief at Part I.
52. ALPA excepts the ALJD's failure to find that, during the 1995-1996 bargaining and the 2004 bargaining, Unit 1 proposed limits—through a seniority-based system—on ALPA's discretion to implement lay offs. See ALPA Brief at Part I.C.2.
53. ALPA excepts the ALJD's failure to find that Unit 1 agreed to withdraw its seniority-based job abolishment proposal in favor of increased severance pay and benefits in 1996 and in 2004 and recall rights in 2008. See ALPA Brief at Part I.C.2.

54. ALPA excepts the ALJD's failure to find that ALPA followed the terms of the May 7 last, best, and final offer in laying off Elaine Grittner. See ALPA Brief at Part II.
55. ALPA excepts the ALJD's failure to find that ALPA gave Unit 1 nearly three months notice of its intent to layoff Grittner. See ALPA Brief at Part II.
56. ALPA excepts the ALJD's failure to find that ALPA set aside two days to meet with Unit 1 to discuss this single employee and that, during those two days of meetings, ALPA and Unit 1 exchanged and discussed proposals concerning the announced lay off of Grittner. See ALPA Brief at Part II.
57. ALPA excepts the ALJD's failure to find that Kelly Collie, on behalf of ALPA, informed Unit 1 that during the discussions concerning the decision to lay off Grittner, that Grittner could fill an ALPA vacancy in Houston. See ALPA Brief at Part II.

D. EXPIRATION OF MERIT PAY PROGRAM

58. ALPA excepts the ALJD's finding that ALPA violated Sections 8(a)(1) and (5) of the Act by ceasing to process merit payments following the expiration of the CBA in 2009.
59. ALPA excepts the ALJD's finding that employees whose anniversary dates occurred on or about March 31 did not receive the merit increases to which the 2004-2009 contract extension entitled them. (ALJD 10:11-14). Employees whose anniversary dates fell on or before March 31 received the merit increases to which they were entitled under the 2004-2009 contract. See ALPA Brief at Part V.
60. ALPA excepts any ALJD finding that employees were "entitled" to, "due," "otherwise due," or automatically "eligible" for a merit increase. (ALJD 10: 14, 16

- 25, 31). While the contract was in effect and after its expiration, employees were eligible for merit-based pay increases based on merit, rather than as an entitlement, and only through a percentage increase arrived at through the collective bargaining process. ALPA Brief at Part V.
61. ALPA excepts the ALJD's finding that R. Exh. 21 demonstrates that employees whose performance appraisals were due on or before March 31 had their performance appraisals completed in advance. (ALJD 10:11-25). R. Exh. 21 contains the list of employees with anniversary dates from April 1 through May 7.
62. ALPA excepts the ALJD's finding that ALPA "h[e]ld," or stopped performing, all performance evaluations for the employees whose anniversary dates fell after March 31, 2009. (ALJD 10:14-18). Following the expiration of the CBA, ALPA continued to conduct performance appraisals, as provided for in Section 16 of the expired contract. ALPA further agreed with Unit 1 in its standstill agreement with Unit 1 that whatever rate the parties ultimately agreed upon would be applied retroactively for those employees to April 1, 2009. Tr. 513:22-513:9. See ALPA Brief at V.C.
63. ALPA excepts the ALJD's finding that ALPA admitted that it did not notify or engage in negotiations with Unit 1 over the expiration of the merit pay increases before they expired. (ALJD 10:21-23) Unit 1 and ALPA had been negotiating over the merit pay increases in the new contract since at least February 12, and had reached agreement on March 31 that the merit increase would be zero. Collie also testified that, on March 31, 2009, the parties agreed that there would be no extension of merit pay after the contract's expiration. Tr. 515:10-516:20, 661:25-663-15. See ALPA Brief at Part V.C.

64. ALPA excepts the ALJD's finding that the merit pay's expiration was a "unilateral suspen[sion]" (ALJD 10:30-32), a "unilateral change," (ALJD 10:41), or a "change," (ALJD:10:44). Because the 2004-09 CBA expired, there were no rates for ALPA to apply after March 31, 2009. See ALPA Brief at Part V
65. ALPA excepts the ALJD's finding that Stone Container did not permit the parties to negotiate that the merit-based pay increase following the expiration of the CBA would be zero. (ALJD 11 n.13:30-36). See ALPA Brief at Part V.D.
66. ALPA excepts the ALJD's finding that ALPA did not give Unit 1 advance notice that employees with anniversary dates after March 31 would not receive merit-based pay increases following the contract's expiration [(ALJD 11 n.13:34-36). Unit 1 and ALPA had been negotiating over the merit payments in the new contract for at least one and one-half months and had reached agreement that they would cease, and that the parties' past practice was for merit payments to cease when the contract expired. Tr. 515:10-516:20, 661:25-663-15. See ALPA Brief at Part V.C.
67. ALPA excepts the ALJD's finding that the parties' agreement to freeze wages was contingent on reaching a successor collective bargaining agreement. (11:36-38). See ALPA Brief at Part V.C (discussing *Stone Container* doctrine)
68. ALPA excepts the ALJD's finding that ALPA's implementation of its last, best, and final contract offer was unlawful. (11:38-39). See ALPA Brief at Part V.
69. ALPA excepts the ALJD's failure to find that ALPA and Unit 1 negotiated across-the-board increases and merit-based pay increases that applied to a specific, defined contract year. See ALPA Brief at Part V.B,C.

70. ALPA excepts the ALJD's failure to find that ALPA continued doing performance appraisals from April 1 to May 6, 2009. See ALPA Brief at Part V.C.
71. ALPA excepts the ALJD's failure to find that ALPA would have committed an unfair labor practice if it had unilaterally imposed a merit-based pay increase after the contract expired on March 31, 2009. See ALPA Brief at Parts V.A, B, C.
72. ALPA excepts the ALJD's failure to find that that the applicable legal question is whether ALPA continued its preexisting system, not the rate at which ALPA paid merit-based pay increases. See ALPA Brief at Parts V.A-C.
73. ALPA excepts the ALJD's failure to find that every Unit 1 contract, from 1992-2009, specified that across the board and merit-based pay increases were applicable only during a defined contract year. See ALPA Brief at Parts V.A-C.
74. ALPA excepts the ALJD's failure to find that when the 1992-1995 agreement and the 2000-2004 agreements expired, ALPA performed employee performance appraisals, but did not process any merit pay increases post-expiration until *after* ALPA and Unit 1 reached agreement on the successor contract and, specifically, the merit pay rates for that particular contract year. See ALPA Brief at Parts V.B, C.
75. ALPA excepts the ALJD's failure to find that from April 1 through May 7, ALPA continued to seek an agreement with Unit 1 on all terms and conditions of employment, including merit-based pay. See ALPA Brief at Parts V.C.
76. ALPA excepts the ALJD's failure to find that because the previous merit-based pay increase rates had been negotiated to apply to a specific, discrete contract year, there was no "practice" ALPA could continue on its own to determine a merit-based pay

increase following expiration of the CBA on March 31, 2009. See ALPA Brief at Parts V.B, C.

77. ALPA excepts the ALJD's failure to find that ALPA provided Unit 1 with notice and an opportunity to bargain over the merit-based pay increases pursuant to the *Stone Container* doctrine when ALPA and Unit 1 spent one and a half months in negotiations concerning, among other things, the merit-based pay system. See ALPA Brief at Parts V.D.

78. ALPA excepts the ALJD's failure to find that, under *NLRB v. Katz*, 369 U.S. 736 (1962), the amount of the merit increase is so indeterminate that there is no violation for ceasing to give it.

E. IMPLEMENTATION OF LAST, BEST, AND FINAL OFFER

79. ALPA excepts the ALJD's finding that ALPA violated Sections 8(a)(1) and (5) of the Act in unilaterally imposing its last, best, and final offer on May 7, 2009. (ALJD 16:16-18.) See ALPA Brief at Part IV.

80. ALPA excepts the ALJD's failure to find that the parties had a negotiation session on February 13 and excepts the ALJD's finding that the parties had negotiation sessions on April 3 and on March 14. (ALJD 11 n.15:47-49). Negotiation sessions were limited to January 5, 6, 7, 13, and 14; February 9, 10, 11, 12 and 13; March 10, 11, 12, 25, 26, 27, 28, 29, 30, and 31; and April 1, 14, 16, 17, and 30. R. Exh. 15.

81. ALPA excepts the ALJD's failure to find that retiree health care was the "most significant issue" in the 2009 negotiations. Tr. 619:12-19. See ALPA Brief at Part IV.

82. ALPA excepts the ALJD's failure to find that, during the 2004 and 2008 negotiations, ALPA and Unit 1 were unable to reach an agreement concerning changes to the retiree health benefits provided by ALPA. See ALPA Brief at Part IV.C.
83. ALPA excepts the ALJD's failure to find that the majority of the parties' negotiations from March 25-30, 2009 were devoted to retiree health, with Unit 1 taking the position that the funding crisis ALPA was facing on retiree health was not Unit 1's fault and not Unit 1's responsibility for fixing it, See ALPA Brief Background Facts - II.C; ALPA Brief at Part IV.C.
84. ALPA excepts the ALJD's finding that Unit 1's proposal described on page 12, lines 48-51 of the ALJD was proposed on March 29. (ALJD 12:48-51). It was proposed on March 31. GC Exh. 23.
85. ALPA excepts the ALJD's failure to find that Unit 1 and ALPA exchanged proposals on March 31, 2009, and that a large part of Unit 1's presentation during negotiations on March 31, 2009 was a detailed proposal over retiree health. ALPA Brief Background Facts - II.C; ALPA Brief Part IV.C.
86. ALPA excepts the ALJD's failure to find that, on March 31, 2009 the parties had not reached agreement concerning compensation for senior employees, retiree healthcare, and job security. See ALPA Brief at Background Facts - II.C; ALPA Brief at Part Parts IV.B, C.
87. ALPA excepts the ALJD's failure to find that during negotiations with Unit 1 on April 1, 2009, ALPA modified its position on job security to accept Unit 1's "new model" for conducting layoffs. ALPA's modification represented the first time

ALPA had agreed to any restriction or limitation on its discretion to abolish positions.

See ALPA Brief at Background Facts - II.C; ALPA Brief at Part I.C.2

88. ALPA excepts the ALJD's failure to find that the April 16 negotiations between ALPA and Unit 1 focused largely on the retiree health plan, after which ALPA and Unit 1 were still in complete disagreement. R. Exh. 15 at ALPA 12376-77.
89. ALPA excepts the ALJD's finding that Unit 1 "accepted" ALPA's proposal on April 16. (ALJD 13:13-16). Although ALPA and Unit 1 agreed on many issues, Unit 1's response to ALPA's proposal is better characterized as a counterproposal given that Unit 1 did not agree to ALPA's proposal on the central issues dividing the parties. GC. Exhs. 39, 40, 41; R. Exh. 34.
90. ALPA excepts the ALJD's failure to find that Unit 1's April 30 counter-offer to ALPA's April 16 last, best, and final offer did not result in ALPA and Unit 1 reaching agreement on compensation for senior employees, retiree healthcare, or job security. *Compare* GC Exh. 34 *with* GC Exh. 40.
91. ALPA excepts the ALJD's finding that ALPA eliminated approximately 47 Unit 1 positions since 2002. (13:30-32) ALPA eliminated 47 Unit 1 employees since 1991. R. Exh. 22.
92. ALPA excepts the ALJD's failure to find that job security would have been a core issue during the 2009 negotiations regardless of whether ALPA had allegedly refused to bargain with Unit 1 over the layoffs of Unit 1 members in January and February, 2009. (13:30-37). ALPA Brief at Parts IV.B, C.
93. ALPA excepts the ALJD's characterization of Unit 1's April 30, 2009 response to ALPA's last, best, and final offer as a demand to bargain about all future decisions to

- reduce Unit 1 staffing. (ALJD 14:5-6). Unit 1's counter-offer requires only "meet[ing]" and "discuss[ing]" future decisions to reduce Unit 1 staffing. GC Exh. 40 at 1; GC Exh. 41 at 1.
94. ALPA excepts the ALJD's finding that serious unremedied unfair labor practices that merely "affect" collective bargaining negotiations taint an otherwise good-faith impasse. (ALJD 15:24). ALPA Brief at Part IV.
95. ALPA excepts the ALJD's finding that the central question is whether ALPA's allegedly unlawful conduct had a "detrimental[] affect[]" on the collective bargaining negotiations and "contributed to the deadlock." (15:24-26) The central question is whether ALPA's allegedly unlawful conduct caused the deadlock. ALPA Brief at Part IV.
96. ALPA excepts the ALJD's finding that ALPA's conduct made it harder for ALPA and Unit 1 to come to an agreement. (ALJD 15:28-29, 15:32-35). Any ULP arising out of ALPA's refusal to disclose information neither increased friction in bargaining nor changed the baseline. The parties would have reached impasse regardless of any ULP. ALPA Brief at Part IV.
97. ALPA excepts the ALJD's finding that ALPA's refusal to negotiate over the January and February, 2009 layoffs in Herndon, Minneapolis, and Houston was related or relevant to, or affected in any way, the impasse in negotiations reached by ALPA and Unit 1 in May of 2009. (ALJD 15:31-32). Any ULP arising out of ALPA's refusal to disclose information neither increased friction in bargaining nor changed the baseline, and the parties would have reached impasse regardless of any ULP. ALPA Brief at Part IV.

98. ALPA excepts the ALJD's finding that the alleged failure of ALPA to provide Unit 1 with the (i) names of those to be laid off in January and February, 2009 prior to ALPA informing the employees that they would be laid off, (ii) the dates on which the job abolishments would occur, or (iii) the reasons for selecting which employees would be laid off was related or relevant to the impasse in negotiations reached by ALPA and Unit 1 in May of 2009 or had any affect at all on the impasse in negotiations reached by ALPA and Unit 1 in May of 2009. (15:32-35, 38-40). Any ULP arising out of ALPA's refusal to disclose information neither increased friction in bargaining nor changed the baseline, and the parties would have reached impasse regardless of any ULP. ALPA Brief at Part IV.³
99. ALPA excepts the ALJD's finding that ALPA's prior knowledge of which employees would be affected by ALPA's decision to abolish jobs is relevant to the question of whether impasse was tainted in May. (15:40-41) Any ULP arising out of ALPA's refusal to disclose information neither increased friction in bargaining nor changed the baseline, and the parties would have reached impasse regardless of any ULP. ALPA Brief at Part IV.
100. ALPA excepts the ALJD's finding that ALPA's conduct in January and February, 2009 made it more difficult for the parties to reach agreement or changed the baseline for the collective bargaining negotiations that took place from January, 2009 through the end of April 2009. (15:43-44). Any ULP arising out of ALPA's refusal to disclose

³ As discussed above, *supra* at Part B, ALPA also excepts the finding that it did not provide the dates on which the job abolishments would occur or an explanation of the method for selecting individual employees for layoff. Also, ALPA notes that many employees continued to work for several months, after notification of their layoff, before they were ultimately separated. See R. Exh. 17.

information neither increased friction in bargaining nor changed the baseline, and the parties would have reached impasse regardless of any ULP. ALPA Brief at Parts IV.A, C.

101. ALPA excepts the ALJD's finding that ALPA's alleged failure to provide purportedly "necessary and relevant" information about the decision and effects of abolishing certain positions under the existing collective bargaining agreement put Unit 1 at a disadvantage in bargaining over job security provisions for the next collective bargaining agreement. (16:2-5) Unit 1 and ALPA engaged in extensive exchanges of proposals and counterproposals over job security in the 2009 round of bargaining, during which Unit 1 was in no way impaired, and, in any event, any impact the January and February, 2009 information ULPs may have had on bargaining was long dissipated by negotiations in March and April, 2009 as well as deadlock in May, 2009. ALPA Brief at Background Facts - II.C; ALPA Brief at Part IV.

102. ALPA excepts the ALJD's finding that ALPA's purported unfair labor practices caused Unit 1 to focus its bargaining proposals on protecting unit employees impacted under the existing CBA's Section 11 rather than making proposals about the decision and effects to abolish unit employee positions. (16:5-9). In many prior rounds of collective bargaining, job security had been a significant and central issue for Unit 1, and it would have been a central issue in the 2009 round of bargaining regardless of ALPA's purported January and February, 2009 ULPs. ALPA Brief at Background Facts - II.C; ALPA Brief at Parts I.C.2, IV.

103. ALPA excepts the ALJD's finding that the mid-contract elimination of Unit 1 position and/or the effects of the mid-contract elimination of the Unit 1 job positions under the expired CBA was a "core issue" separating ALPA and Unit 1 in negotiations for a new CBA in 2009. (16:5-11). Unit 1 never proposed recalling Unit 1 employees nor attempted to condition bargaining on recall of Unit 1 employees. ALPA Brief at Part IV.C.1.
104. ALPA excepts the ALJD's finding that ALPA's purported unfair labor practices caused the impasse. (16:13-15). There was no causal connection whatsoever between ALPA's purported unfair labor practices in January and February, 2009 and the deadlock in May, 2009. ALPA Brief at Part IV.
105. ALPA excepts the ALJD's finding that the parties could not and did not reach a good-faith impasse. (16:15-16). ALPA Brief at Part IV.
106. ALPA excepts the ALJD's finding that ALPA was not privileged to implement its last, best and final contract offer. (16:16).
107. ALPA excepts the ALJD's failure to find that even if ALPA engaged in two unfair labor practices related to the eleven January and February, 2009 layoffs, neither unfair labor practice increased friction at the bargaining table. ALPA Brief at Background Facts - II.C; ALPA Brief at Part IV.
108. ALPA excepts the ALJD's failure to find that any resentment Unit 1 negotiators harbored over the layoffs announced in January and February, 2009 and related information requests did not rise to the level of "egregious" conduct, nor was it "calculated to reduce union representation to inconsequentiality." ALPA Brief at Part IV.B.

109. ALPA excepts the ALJD's failure to find that even if ALPA engaged in two unfair labor practices related to the layoffs that ALPA announced in January and February, 2009, neither ULP changed the baseline, and the evidence shows that the parties would have reached impasse over retiree health regardless of any ULP. ALPA Brief at Part IV.C.
110. ALPA excepts the ALJD's failure to find that layoffs were a recurring, significant issue for Unit 1 during collective bargaining negotiations that occurred before the 2009 negotiations between ALPA and Unit 1. ALPA Brief at Parts I.C.2, IV.C.
111. ALPA excepts the ALJD's failure to find that it was inevitable that layoffs would be a major issue in negotiations for Unit 1 in 2009, regardless of ALPA's purported ULPs. ALPA Brief at Part IV.C.
112. ALPA excepts the ALJD's failure to find that ALPA was not attempting to avoid agreement with Unit 1 in negotiating a successor collective bargaining agreement with Unit in 2009. ALPA Brief at Part IV.C.
113. ALPA excepts the ALJD's failure to find that there is nothing in the record implying that Unit 1 would have acceded to ALPA's retiree health proposal to resolve the outstanding disagreement on job security. ALPA Brief at Part IV.C.

F. CONCLUSIONS OF LAW

114. ALPA excepts the ALJD'S legal conclusion that ALPA violated Sections 8(a)(1) and (5) of the Act by delaying in or failing and refusing to provide certain information requested by Unit 1 in letters dated January 5 and 13, 2009 and orally on January 7 and February 9, 2009. (16: 25-27) See ALPA Brief at Part III.

115. ALPA excepts the ALJD'S legal conclusion that the requested information in the aforementioned paragraph was necessary for or relevant to Unit 1's performance of its duties as the exclusive collective bargaining representative of the unit of all professional and administrative ALPA employees, excepting supervisors. (16:27-32). See ALPA Brief at Parts III, IV.
116. ALPA excepts the ALJD'S legal conclusion that ALPA violated Section 8(a)(1) and (5) of the Act by unilaterally changing the terms and conditions of employment, including merit pay provisions, without having reached agreement with Unit 1. (16:34-36). See ALPA Brief at Part V.
117. ALPA excepts the ALJD'S legal conclusion that ALPA violated Sections 8(a)(1) and (5) of the Act by failing to bargain with Unit 1 over the decision to abolish jobs/lay off employees on January 8 and 9, February 19, 26, 2009 and January 29, 2010, and the effects of those decisions. (16:38-40). See ALPA Brief at Parts I, II.
118. ALPA excepts the ALJD's legal conclusion that ALPA violated Sections 8(a)(1) and (5) of the Act by failing to bargain with Unit 1 over the decisions to abolish jobs/lay off employees in January and February, 2009 and in January, 2010, and the effects of that decision. See ALPA Brief at Part I.
119. ALPA excepts the ALJD'S legal conclusion that ALPA violated Sections 8(a)(1) and (5) of the Act in declaring that the parties were at impasse in their collective bargaining negotiations. (16:42-43). See ALPA Brief at Part IV.
120. ALPA excepts the ALJD'S legal conclusion that ALPA violated Sections 8(a)(1) and (5) of the Act in implementing its last, best, and final proposal on May 7, 2009. (16:43-44). ALPA Brief at Part IV.

121. ALPA excepts the ALJD'S conclusion that the parties had not reached impasse by May 7, 2009. (16:44). ALPA Brief at Part IV.

G. REMEDY/ORDER

122. ALPA excepts the ALJD's recommended remedy. (17:4-29). The only appropriate remedy for the merit increase is a bargaining order, because the amount of the increase after April 1, 2009 is wholly speculative. See ALPA Brief at Part VI.

123. ALPA excepts the ALJD's recommended order (17:31-19:21). The only appropriate remedy for the merit increase is a bargaining order, because the amount of the increase after April 1, 2009 is wholly speculative. See ALPA Brief at Part VI.

124. ALPA excepts the ALJD's Notice to Employees. (20:5-21:48)

125. ALPA excepts the ALJD's failure to find that if ALPA is found to have lawfully imposed its last, best, and final offer on May 7 then any liability for the merit increases must be reduced to the period between March 31 and May 7.

Respectfully submitted,

/s/ Devki Virk
Devki K. Virk
Kathleen Keller
Judith Miller
BREDHOFF & KAISER, PLLC
805 Fifteenth Street, N.W., Suite 1000
Washington, DC 20005
(202) 842-2600 (Tel.)
(202) 842-1888 (Fax)

Dated: May 16, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of May, 2011 served a copy of these Exceptions

by email service upon the following.

Patrick Cullen
Brendan Keough
Counsel for NLRB General Counsel
National Labor Relations Board, Region 5
103 S. Gay Street, 8th Floor
Baltimore, MD 21202-4061
Patrick.Cullen@nlrb.gov
Brendan.Keough@nlrb.gov

Robert Kurnick
Sherman, Dunn, Cohen Leifer & Yellig, P.C.
900 7th Street, NW, Suite 1000
Washington, DC 20001
Kurnick@shermardunn.com

/s/ Judith Miller
Judith Miller