

**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  
EMPLOYEES, UNIT 1

**BRIEF IN SUPPORT OF EXCEPTIONS  
OF RESPONDENT AIR LINE PILOTS ASSOCIATION INTERNATIONAL (“ALPA”)**

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## STATEMENT OF THE CASE

This case involves a union as employer, the Air Line Pilots Association, International (“ALPA”), and the staff union that has long represented ALPA's professional employees, the Union of ALPA Professional and Administrative Employees, Unit 1 (“Unit 1”). The Administrative Law Judge found that ALPA violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (“the Act”) by (1) failing to bargain with Unit 1 over the decisions to lay off eleven<sup>1</sup> employees in January and February 2009 (ALJD 5:31-9:35)<sup>2</sup>; (2) failing to timely provide Unit 1 representatives with certain information in connection with those decisions (ALJD 4:4-5:29), and (3) that, as a consequence of these alleged violations, the impasse reached in May 2009 during the parties’ negotiations for a successor collective bargaining agreement (“CBA”) was tainted, making ALPA’s imposition of its last, best offer unlawful (ALJD 11:6-16:18). In addition, the Administrative Law Judge found two other independent violations of the Act: (1) that ALPA unlawfully failed to bargain over the terms of the merit pay program to be in effect following expiration of the CBA (10:3-11:5), and (2) that ALPA unlawfully failed to bargain concerning the decision to lay off Elaine Grittner, a benefits specialist in ALPA’s Minneapolis office (7:11-31).

In connection with those findings, the ALJ recommended an order requiring ALPA to supply the requested information, to reinstate the terms and conditions of the expired collective

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<sup>1</sup> The parties stipulated that Dan Froelich, who had been named as laid off in the General Counsel’s complaint, had not in fact been laid off. Tr. 806:1-22.

<sup>2</sup> We abbreviate references to the Administrative Law Judge Decision as “ALJD,” references to the hearing transcript as “Tr.,” and references to the exhibits as “GC Exh.” or R. Exh.” (for General Counsel exhibit or Respondent exhibit, respectively). We refer to page and line numbers by “page:line(s).”

bargaining agreement, and to make Unit 1 members whole.<sup>3</sup> With regard to the layoffs, the ALJ recommended an order requiring ALPA to bargain with Unit 1 over the eleven laid off employees and the effects of the layoffs, and to reinstate the twelve employees and make them whole. (17:4-21:24).

The record compiled during a five-day hearing in November 2010 demonstrates that none of these findings or conclusions of law has merit:

*First:* The thirty-year record of the parties' relationship shows that Unit 1 clearly and unmistakably waived any right to bargain over ALPA's decisions to abolish positions and lay off Unit 1 members. Indeed, prior to 2009, in response to the vicissitudes of the airline industry and the needs of its pilot membership, ALPA abolished numerous Unit 1 positions (forty-six positions between 1991 and 2008). Never once, prior to 2009, did Unit 1 request to bargain over such decisions. Nor did Unit 1 ever imply that ALPA lacked authority and discretion to abolish Unit 1 positions. To the contrary, as the undisputed record shows, Unit 1 repeatedly proposed during contract negotiations that explicit contractual limits be placed on ALPA's ability to reduce/eliminate Unit 1 positions. Dispositively, Unit 1 has uniformly withdrawn each those bargaining proposals in exchange for bargaining improvements with regard to the effects of any job abolishment decisions—that is, the rights and benefits accorded to employees whose positions ALPA abolishes. The parties' agreement, again and again, is clear: in exchange for increasingly generous benefits for employees subject to layoff, Unit 1 agreed to leave the decision whether to abolish positions within ALPA's management discretion. Such was the case in the negotiations that resulted in the very contract under which the layoffs at issue in this case occurred: in the face of specific knowledge and extensive communication about the likelihood

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<sup>3</sup> The ALJ's order does not specify the terms – *i.e.*, the percentage increase – to be applied in connection with the make whole remedy.

of layoffs during the term of the agreement, Unit 1 and ALPA bargained over the effects of any layoffs that may occur during the term of the CBA. In particular, Unit 1 sought substantial increases in the benefits and rights of laid-off employees – attaching, in essence, a “penalty” if ALPA abolished a position – rather than any restriction on ALPA’s right to conduct layoffs. Unit 1’s subsequent demand, mid-contract, to bargain over announced layoffs in January and February 2009, therefore represents a reversal from decades of established practice and an attempt to obtain something from the Board that it negotiated away, for ample consideration, at the bargaining table.<sup>4</sup> The ALJ’s finding that ALPA acted unlawfully by refusing to bargain over the layoff decision ignores this undisputed record. Moreover, the ALJ’s finding that ALPA acted unlawfully by refusing to bargain mid-term over the effects of the layoff is also in error, given that the parties had already negotiated the benefits available to employees subject to layoff. No further bargaining is required under the Act. For those reasons, the ALJ’s decision in this regard must be reversed.

The ALJ also found that ALPA failed to bargain over the layoff of Elaine Grittner, announced in November 2009 and effective in January 2010. Irrespective of whether ALPA has an obligation to bargain, the evidence established that ALPA did in fact meet any bargaining obligation. ALPA and Unit 1 met for two days in December 2009 to exchange proposals regarding any way to avoid or mitigate Grittner’s layoff. That those good-faith discussions did not produce an agreement provides no basis to conclude that ALPA’s conduct was unlawful.

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<sup>4</sup> Because the ALJ failed to address the long line of Board precedent making clear that past practice and bargaining history are relevant factors in determining whether Unit 1 clearly and unmistakably waived any right to bargain over ALPA’s decisions to abolish positions and lay off Unit 1 members, the Board should reverse the ALJ’s decision or, at minimum, remand for further consideration. *New York Mirror*, 151 NLRB 834 (1965).

*Second:* Because ALPA had no obligation to bargain over the January/February 2009 layoffs, the allegation that ALPA refused to provide information regarding these decisions fails at the outset. Even if such an obligation existed, however, the evidence at the hearing established that ALPA *did* provide Unit 1 with the relevant information requested, including the number of positions that would be eliminated and the dollar amount that those positions cost ALPA. Further, ALPA also responded to Unit 1's request regarding how individuals were selected for layoffs: ALPA's Human Resources Director, Kelly Collie, explained that the decisions were an exercise of management discretion, and noted the pilots' needs and the employee's specialized knowledge and value to ALPA were factors in the decision-making process.

*Third:* The ALJ's finding that ALPA unlawfully imposed terms and conditions on May 7, 2009, rises and falls on the resolution of the two ULPs that concern the January/February layoffs. If, as we believe is the case, neither of those predicate charges has merit, then ALPA was free to implement following what the General Counsel concedes was, in fact, a good-faith impasse. Moreover, even if one or both of those ULPs is sustained, the ALJ erred in finding that the General Counsel carried his burden of establishing a causal nexus between the alleged unlawful conduct and the ultimate impasse. Accordingly, the ALJ's decision must be reversed.

As Unit 1's witnesses conceded, the parties faced very difficult circumstances going into the 2009 negotiations, including recent substantial declines in ALPA's revenue; a 2008 reduction-in-force – completely unchallenged by Unit 1 – that was the largest in ALPA's history; and a retiree health program (“RHP”) whose long-term viability was very much in doubt following the collapse of the financial markets in late 2008. This was unquestionably the state of affairs *before* ALPA undertook the January-February layoffs, and it remained the landscape afterwards. The parties bargained hard: they met dozens of times over a period of four months, and were able to

solve some difficult issues; however, at expiration and afterwards, through a more than month-long mediation period, they remained genuinely at loggerheads over multiple issues. There simply exists no evidence that there was a causal connection between either alleged ULP, and the failure to reach an agreement. The negotiations concerning retiree health provide an apt example: Those negotiations were complex and difficult and occupied the majority of the parties' negotiating time. As we explain in detail below at Section II C.2., when impasse was reached in May, a large philosophical and practical gulf continued to separate Unit 1 from ALPA. On these facts, the ALJ's finding that the impasse was caused by ALPA's decision to reduce twelve Unit employees many months earlier cannot be sustained.

*Fourth:* The ALJD also found an unfair labor practice based on the fact that ALPA did not bargain with Unit 1 concerning the terms of the merit pay program after the collective bargaining agreement expired on March 31, 2009 and before ALPA's imposition of its final offer on May 7, 2009. This action, which stands alone and is not alleged to have contributed to the impasse, was plainly lawful. The merit-based salary increases to which employees were entitled under the 2008-2009 CBA were annual-based wage increases, payable to each employee on his or her anniversary date *during a specific contract year*. While the merit-pay system survives expiration, the amount of any increase can be determined only through negotiations. For that reason, the undisputed record shows that ALPA continued to conduct performance appraisals, as provided for in Section 16 of the expired contract. Moreover, it agreed with Unit 1 that whatever rate the parties agreed upon would be applied *retroactively* to April 1, 2009. These facts belie the ALJ's finding that ALPA unilaterally changed a term of the contract. Accordingly, the ALJ's finding that ALPA violated the Act must be reversed.

*Fifth*, even if the Board affirms the ALJ's erroneous findings, the ALJ erred by issuing a "make whole" remedy, requiring ALPA to pay retroactive "merit" raises. As explained in detail below, the undisputed factual record shows that the amount of any merit-based pay increases was negotiated by ALPA and Unit 1 and payable during a specific contract year. Accordingly, if it is determined that ALPA acted unlawfully by failing to provide a 4.5% merit-based increase following expiration of the CBA, the only proper remedy is a bargaining order providing ALPA and Unit 1 the opportunity to negotiate what the merit-based pay increase should be.<sup>5</sup>

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<sup>5</sup> As set forth below, it is significant that, during the negotiations that took place prior to the contract's expiration, ALPA and Unit 1 had tentatively agreed on a wage freeze, including no merit-based pay increases. *See infra* at note 50.

## **QUESTIONS PRESENTED**

1. Whether the ALJ erred in determining that ALPA violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with Unit 1 over the 2009 layoffs and their effects. See Exceptions 18-57.
  
2. Whether the ALJ erred in determining that ALPA violated Sections 8(a)(1) and (5) of the Act by allegedly delaying and failing or refusing to provide the information requested by Unit 1 concerning the 2009 layoffs. See Exceptions 4-17.
  
3. Whether the ALJ erred in determining that ALPA violated Sections 8(a)(1) and (5) of the Act by declaring impasse in its 2009 negotiations and subsequently imposing ALPA's last, best, and final offer. See Exceptions 79-113.
  
4. Whether the ALJ erred in determining that ALPA violated Sections 8(a)(1) and (5) of the Act by allegedly unilaterally changing the merit pay program without bargaining with Unit 1. See Exceptions 58-78.
  
5. Whether the ALJ erred in ordering a make whole remedy for the purported failure to bargain over changes to the merit pay program. See Exceptions 122-123.

## **BACKGROUND FACTS**

### **I. HISTORY**

The Air Line Pilots Association, International (“ALPA”), Respondent here, is a labor organization representing 53,000 pilots employed with thirty-eight commercial and passenger carriers in the United States and Canada. Tr. 337:15-18; 338:3-6. ALPA's predominant source of income is the dues paid by its pilot members, which are calculated as 1.95% of the individual pilot’s income. Tr. 343:11-15; GC Exh. 54 at 2. Accordingly, ALPA’s income decreases whenever airlines reduce flying or reduce wages for pilots. *Id.* Although both of these considerations – reduced flying time and reduced wages – have always been key to ALPA’s income, such events have become increasingly frequent in the last decade, with the industry bankruptcies and restructuring and the recent financial crisis. Tr. 345:3-20; 316:17-347:11.

ALPA is governed by elected officers. The pilots employed by each airline elect local council officers at each “base” of the airline (larger airlines have multiple bases), and a master executive council (“MEC”), also composed of directly elected officers, represents the entire pilot group at that airline. Tr. 337:12-338:24. At the international level, a Board of Directors composed of about two hundred and forty officers who are directly elected by the members meets biennially, similar to the “delegate conventions” held by other international unions; an Executive Board that includes all thirty-eight MEC Chairman meets twice each year; and a fourteen-member Executive Council, consisting of the National Officers and a smaller group of elected leaders, meets six or seven times a year and as needed to direct the affairs of the union. Tr. 338:10-339:22. ALPA's policy manual contains specifically prescribed procedures about how dues income is allocated to each MEC; the Executive Council cannot change that policy, but it is authorized to review and approve budgets within that policy. Tr. 340:23-341:12.

Unit 1 represents approximately one hundred and sixty highly-trained professional employees, many of whom directly assist ALPA's members in the labor-management relationship between carriers and their pilots. Unit 1 includes contract administrators who negotiate and enforce collective bargaining agreements, attorneys, economic analysts, accountants, and investment and benefits analysts, as well as a select cadre of general support personnel, such as information technology professionals. Tr. 486:18-20; 65:8-12, 15-20. The salaries for Unit 1 employees range from \$38,401 to \$229,901 with an average salary in the range of \$100,000. GC Exh. 42 at 70; Tr. 151:5-9. About two-thirds of Unit 1-represented employees work at ALPA's headquarters in Herndon, Virginia. The balance are based in the field, either in MEC or ALPA-maintained offices, to be closer to the members whom they service. Tr. 486:21-487:1.<sup>6</sup>

Since at least 1979, Tr. 484:13-14., ALPA and Unit 1 have successfully negotiated a series of collective bargaining agreements including everything from detailed provisions concerning employee travel and expense reimbursement to basic economic and non-economic terms. The parties' 2004 agreement originally expired on March 31, 2008; however, as the parties began bargaining, they recognized that the uncertainties in ALPA's future, including an impending election at USAirways to decertify ALPA as the pilots' bargaining agent at that carrier and the announced merger of two other major carriers, Delta and Northwest Airlines, made bargaining for a comprehensive, long-term agreement impractical. They therefore agreed to focus on major issues and to otherwise extend the 2004-2008 for one additional year, through March 31, 2009. The new, one-year agreement that resulted from these negotiations is the contract that was in

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<sup>6</sup> The approximately ninety clerical employees of ALPA (including such job positions are secretaries, account clerks, membership service representatives, and mail room workers,) are represented by a separate and independent union known as Unit 2, which is not involved in this dispute. Tr. 487:2-12; 65:12-14.

force during the events giving rise to the instant complaint, and is often referred to by the parties as the 2008 “extension.”

Bargained in an atmosphere of uncertainty, the 2008-2009 agreement included substantial improvements to the benefits accorded to employees whose positions were abolished, including increases in severance entitlements, and new rights of recall and rehire. *See infra* at Section I C.2.b. These new provisions were quickly invoked when ALPA, without challenge or objection by Unit 1, eliminated fifteen positions in 2008, six in Herndon and the remaining nine positions in ALPA’s MEC or Contract Administration offices.

## **II. THE EVENTS GIVING RISE TO THE INSTANT CASE**

### **A. Fundamental Issues in 2009 Bargaining.**

Although the contract negotiated in 2008 did not expire until March 31, 2009, the parties agreed to begin negotiations early, on January 5, 2009. GC Exh. 42 at 84. The 2009 contract negotiations were, as ALPA's lead negotiator, Director of Human Resources Kelly Collie testified, “really difficult” for several reasons. Tr. 619:3. ALPA’s dues income had fallen to its lowest level in ten years, and ALPA was projecting that revenue for the next two years was likely to remain flat. GC Exh. 54 at 1, 2. Medical costs were rising at a rate of more than 9% per year, and the Executive Council had given ALPA management a mandate to hold employee medical costs steady at 2008 levels. *Id.* at 3. In negotiations with Unit 1, ALPA was seeking a two year wage freeze and, for the first time ever, a required health insurance premium for active employees. Tr. 619:3-8. As ALPA noted in an all-employee memorandum issued in March 2009, its “proposals [we]re significant” and represented “a vast departure from past negotiations.” GC Exh. 54 at 3.

In Collie's view, however, “really the most significant issue was retiree health . . . [b]ecause the parties had punted on retiree health a number of times.” Tr. 619:12-19. The parties had tried, but been unable to reach agreement on, changes to the retiree health program during the 2004 negotiations, instead agreeing on an arbitration process that failed to resolve the issue, and had then deferred on the question during the 2008 negotiations. Tr. 619:19-620:10. Due to the collapse of the financial market in 2008, the value of the retiree health fund was reduced dramatically, from approximately \$23 million to around \$12 million, further complicating an already contentious issue. Tr. 620:10-22; Tr. 149:8-12. As a result, ALPA was seeking substantial increases in the required premiums; changes to plan design that would affect co-pays, deductibles, and out-of-pocket limits, and changes to plan eligibility. Tr. 621:5-13; Tr. 150, 152.

Unit 1’s opening proposal, made on January 5, 2009, included proposals on a number of subjects, including job security. R. Exh. 34 at 146-151; Tr. 71:8-9. In that area, Unit 1 sought “to extend and improve recall and preferential hiring rights.” R. Exh. 34 at 149; Tr. 71:19-23. Unit 1 probed ALPA regarding the scope of changes to ALPA’s Minneapolis office, which, as the Delta-Northwest merger moved toward completion, was likely to be the most affected. Tr. 79:25-80:23; Tr. 596:6-22.

**B. Unit 1’s Demand to Bargain Over Layoff Decisions, and Layoffs in Herndon, Minneapolis, and Houston.**

Later on January 5, ALPA was surprised when Unit 1 orally informed the ALPA bargaining committee that the union wished to bargain over layoff decisions. Tr. 83:18-84:1. As Kelly Collie, ALPA’s chief negotiator, testified, from ALPA’s point of view, the process in “2009 was just like 2008,” Tr. 625:14-626:2, and Unit 1 had not sought bargaining over any of the reductions in force in 2008. Wayne Klocke, co-chair of Unit 1’s bargaining committee,

acknowledged that their demand was a break with the past, and reflected a “change in philosophy” within Unit 1’s leadership. GC Exh. 43, 1/6/09,<sup>7</sup> at 7; Tr. 626:3-5.

ALPA declined to bargain over the layoff decisions, although, as it had in 2008 and prior years, it met with Unit 1 representatives just prior to implementation to advise them of the number of positions, both occupied and vacant, that would be eliminated, the location of those positions, and the total dollars attributable to the wage and FICA reimbursements for the positions.<sup>8</sup> GC Exh. 7. Five Unit 1 employees located at Herndon were laid off on January 8-9,<sup>9</sup> and, on February 20, five Minneapolis-based employees<sup>10</sup> were advised that their positions were being abolished effective on dates between February 24 and June 30. R. Exh. 17. On February 26, one additional employee in Houston, James Moody, was informed that his position would be abolished effective April 26. R. Exh. 17. In each instance, consistent with its prior practice, ALPA informed Unit 1 of the names of the affected individuals on the same day that it informed the employees, and provided each employee with Unit 1 representation during the meeting. Tr. 91:21-22; Tr. 289:10-25; Tr. 290:1-7; 421:1-6; 669:1-3.

**C. Negotiations for the 2009 Successor Agreement.**

**1. Negotiations Prior to Contract Expiration**

Between January 5 and the scheduled March 31 expiration date for the agreement, the parties met on at least twenty occasions. In early February, when it was clear that layoffs in the

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<sup>7</sup> Some of notes contained in General Counsel’s exhibit 43 are dated to January, 2008. However, they are actually notes to meetings in January, 2009. Tr. 186:18-21.

<sup>8</sup> In addition to salary, ALPA reimburses Unit 1 employees their half-share of FICA payroll taxes. See GC Exh. 42 (2004-2009 Unit 1 CBA), at 70.

<sup>9</sup> The five were: John Wiley, Richard Parker, Marc Bergeron, Stephen Nagrotsky, and Martin Sobol.

<sup>10</sup> The five were: Doreen Clark, Sue Schemm, Rob Plunkett, Miriam Jamgochian, and Mary Nadeau.

Minneapolis office would result from the Delta-Northwest merger, the parties agreed to set aside several days to discuss job security generally, and the Minneapolis situation specifically, as ALPA committee member Jim Johnson put it, to “talk about . . . the layoffs and what we could do to avoid them.” Tr. 424:7-15. Although both Unit 1 and ALPA made proposals during those meetings, they remained far apart. As it had in previous rounds of negotiations, Unit 1 proposed seniority-based layoff language, and, as it had in those previous rounds, ALPA resisted encroachments on its right to conduct reductions in force. With regard to Minneapolis, Unit 1 suggested that affected employees be offered voluntary leaves of absence, through which seniority and benefits would continue in full, in lieu of job abolishment; ALPA pointed to Section 11 of the CBA, which contained generous, and recently-negotiated improvements in severance, recall, and rehire rights to laid-off employees. No agreements were reached during these discussions.

By mutual agreement, ALPA and Unit 1 did not meet again until March 10. Tr. 111:25-112:4. At that session, Unit 1 identified what it considered to be the main areas of concern: “compensation; [active employee] health care; RHP [retiree health]; job security; [and] scope.”<sup>11</sup> R. Exh. 15 at ALPA 012345. The parties met on multiple occasions during that week and during the week leading up to contract expiration. Layoffs, severance, and related issues were not discussed at all on many of those days; rather, the bulk of the parties’ time was spent focused on other issues, predominantly health insurance for active employees and retirees. *Id.* at 12345-12368.

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<sup>11</sup> “Scope” refers to the “scope of work” section of the CBA, and particularly to Unit 1’s proposals restricting managers and consultants in performing what Unit 1 considered bargaining unit work.

During the final week of March leading to contract expiration, Unit 1 and ALPA met every day. R. Exh. 15 at ALPA 12358-12372; R38 at ALPA 129344-45. Again, a large portion of this time was focused on the retiree health program, with Unit 1 taking the position that any deficit in the funding for retiree health was “not our fault [and] not our responsibility to fix it.” R. Exh. 15 at ALPA12370. ALPA provided substantial information to Unit 1 regarding the financials of the retiree health program. R. Exh. 34 at 105-110.

On the last day of the contract, March 31, the parties again exchanged comprehensive proposals. R. Exh. 15 at 129344-46. A large part of Unit 1’s presentation was a detailed, three-page-long proposal regarding retiree health. R. Exh. 34 at 65-67; *see also id.* at 52-53 (revised version from later that day). Unit 1 also modified its March 27 proposal regarding reductions-in-force. Instead of a complete ban, Unit 1 now proposed an entirely new model under which ALPA would have the right to layoff, using seniority as one factor, if dues income dropped below a certain level. R. Exh. 34 at 61.

As of the date of contract expiration on March 31, the parties remained apart on retiree health, lump sum payments for “red circle[d]” employees (generally senior employees earning at the top of the salary scale for their grades), and job security. Tr. 429:11-430:10; 433:7-14. With respect to retiree health, the parties had yet to agree on any of the three areas of change sought by ALPA: eligibility changes, design changes (including increases to deductibles), and increases to premiums. Tr. 432:20-433:6. In Johnson's view, the parties “had no momentum and . . . were pretty much deadlocked on these three issues.” Tr. 433:7-14.

At that point, ALPA and Unit 1 orally agreed to a “stand still” with respect to the expiring contract so that the parties could engage in mediation. As Klocke testified, he understood this to mean that “everybody was making the pay that they were earning then . . . [E]verything would

just remain the same for one more day, and we wouldn't take any action and they wouldn't take any action.” Tr. 120:5-14.<sup>12</sup> On April 1, ALPA and Unit 1 memorialized the stand-still agreement in writing, in which they agreed to “extend negotiations” through April 2, 2009, and further agreed that “[p]er previous practice when similar extensions were agreed to, the terms of the new agreement will be effective April 1, 2009.” GC Exh. 28.<sup>13</sup>

## 2. Continued Negotiations Following Expiration

On April 1, the parties met, with the assistance of a mediator from the Federal Mediation and Conciliation Service (FMCS). ALPA then made a significant move on job security: it was undisputed that, by 12:49 p.m. on April 1, ALPA had “bought off on” the “new model” for conducting lay-offs proposed by Unit 1 late in the evening on March 31. Tr. 617:5:15. In its counter-proposal, ALPA accepted the concept of a staffing “floor” tied to dues revenue, a sea change from anything ALPA had ever previously considered in this area. Tr. 617:13-23; R. Exh. 34 at 46. This move carried enormous philosophical implications, as well as practical issues, for ALPA: never before had ALPA accepted *any* restriction or limitation on its discretion to abolish positions.

Unfortunately, ALPA’s movement was left unmatched by Unit 1. The parties again met with the mediator on April 14. The day’s discussions were consumed with the retiree health

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<sup>12</sup> One of the very few fact disputes between the parties concerns the conversation that occurred late on March 31, 2009, in connection with the standstill agreement. James Johnson and Kelly Collie both recall that they specifically mentioned to Unit 1 that there would be no pay increases during the stand still period, and Collie recalled specifically referencing merit increases. Tr. 435:13-436:14; 514:25-516:20. Unit 1’s witnesses did not recall any discussion of merit increases at this time. As shown *infra* at Section V, this factual dispute is immaterial to the legal question of whether ALPA was obliged to provide merit-based pay increases to Unit 1 employees after March 31, 2009.

<sup>13</sup> That agreement was subsequently extended three times, finally expiring on May 1, 2009. GC Exhs. 29, 58.

issue. *See* R. Exh. 15 at ALPA 12373; GC Exh. 43 (notes incorrectly labeled March 14, 2009, but indicating meeting with mediator). Unit 1 also requested additional information via the mediator; this information was all related to the retiree health plan, including the “FAS 106” cost, the assumptions on which certain calculations were based, and the present value of liabilities. GC Exh. 5, 4/14/2009 at 1. The parties, however, made very little progress; in Johnson's words, “neither side was moving and we were in still waters.” Tr. 436:19-24.

On April 16, ALPA tendered its last best and final offer to Unit 1. After ALPA's four elected National Officers spoke, the parties met through the night and into early the next morning. R. Exh. 15 at ALPA 12374-76; Tr. 166:16-167:25. These negotiations focused largely on the retiree health plan. R. Exh. 15 at ALPA 12376-77. ALPA and Unit 1 were still in complete disagreement over ALPA's proposal to change the retiree health plan, with Wayne Klocke stating that it was “crystal clear” that ALPA “can't move the [eligibility] goal posts [with]out [Unit 1's] consent,” and adding that “nothing in the Plan can be [changed] w/out [Unit 1's] consent,” including premiums, deductibles, and copays. R. Exh. 15 at 12376-77. ALPA concluded that the two were now “farther apart [rather] than closer” and indicated to Unit 1 that it believed it would have to implement the last best and final offer. *Id.* at 12377.

ALPA nevertheless continued to meet with the FMCS mediator and Unit 1, attempting to reach agreement. Unit 1 provided its counter-offer to ALPA's last, best and final offer on April 30, 2009. R. Exh. 34 at 1. In this counter-offer, Unit 1 did not meet ALPA on any of the three areas of disagreement remaining at the time of the last, best and final offer.

Accordingly, on May 6, after over twenty bargaining sessions and more than 100 hours of bargaining, Tr. 146:8-18, ALPA's General Manager, Jalmer Johnson, wrote to Unit 1 President Jay Wells to advise that ALPA considered the parties at impasse, and would implement the terms

of its last, best and final offer, effective May 7, 2009. Johnson stated that ALPA “regret[ed that] the negotiating process between ALPA and Unit 1 ha[d] led to this destination,” but stated that the decision was compelled by Unit 1’s unwillingness “to address the economic needs of the Association or to recognize the uncertain and risky environment currently facing the industry and economy.” GC Exh. 61.<sup>14</sup>

**D. Board Proceedings**

On March 16, 2009, Unit 1 filed a charge contending that ALPA had unlawfully refused to bargain in January and February over its decisions to eliminate positions in Herndon, Minneapolis, and Houston and had failed to provide information in connection with those decisions. [Charge No. 18-CA-18999, renumbered as 5-CA-34837, GC Exh.1a]. On May 22, 2009, Unit 1 filed a second charge, contending that as a consequence of the conduct alleged in Charge 5-CA-34837, ALPA could not lawfully implement its last, best, and final offer. [Charge No. 5-CA-35014, GC Exh. 1c.] Many months after implementation, on September 10, 2009, Unit 1 initiated another charge, asserting that ALPA’s failure to increase wages for Unit 1 employees during the time period following contract expiration but before impasse was declared amounted to an illegal “discontinuation” of its merit pay program. [Charge No. 5-CA-35244, GC Exh. 1g.] Finally, on, November 23, 2009, Unit 1 charged that ALPA had refused to bargain over the decision to lay off an additional Minneapolis-based Unit 1 employee, a benefits specialist named Elaine Grittner who had serviced the now-defunct Northwest Airlines benefit plans, and the effects of that decision. [Charge No. 5-CA-35419, GC Exh. 1k.] The Region consolidated these four charges for trial, and hearing proceeded in Washington, D.C., on

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<sup>14</sup> Both the General Counsel and the Charging Party conceded that they were not arguing that the parties were not “genuinely at loggerheads,” nor were they arguing that there was any movement still being made by either side. Tr. 156:18-25; 158:3-8.

November 2, November 8-10, November 12, and November 15, 2010. On February 15, 2011, the administrative law judge (“ALJ”) issued the instant decision, finding against ALPA on each charge.

## ARGUMENT

### **I. ALPA HAD NO OBLIGATION TO BARGAIN OVER THE DECISIONS TO LAYOFF UNIT 1 EMPLOYEES IN 2009 OR THE EFFECTS OF THOSE DECISIONS**

The ALJ determined that, because Section 11 of the ALPA-Unit 1 2008-2009 contract extension contained no express clear and unmistakable waiver of statutory rights, Unit 1 did not waive its right to bargain over layoff decisions or their effects. ALJD 8:31-9:35. The ALJ’s decision misstates and misapplies the record evidence and the applicable law.

As the record evidence makes clear, Section 11 of the ALPA-Unit 1 CBA, when interpreted in light of past practice and bargaining history – which Board precedent demands – constitutes a clear and unmistakable waiver of Unit 1’s right to bargain over layoffs and their effects. This interpretation of Section 11 is demonstrated by two key facts. First, Unit 1 never demanded bargaining over reductions in force ALPA implemented in 1985, 1994, 1996, 1999, 2002, 2003, 2004, 2005, and 2008. Second, over more than a twenty-year period, Unit 1 did bargain, as part of contract negotiations, to increase the generous severance provisions to be paid to an employee in the event of a job abolishment in exchange for ALPA maintaining the discretion to lay off employees as it deemed necessary, a key management issue in a constantly changing airline industry. Stated differently, in exchange for allowing ALPA to retain the discretion to determine the need for layoffs, ALPA and Unit 1 negotiated the severance benefits and recall rights that employees subject to layoff would receive.

**A. The Legal Framework: The Standard for Waiver**

It is well-established that an employer's duty to bargain with a union over mandatory terms and conditions of employment continues during the term of a collective bargaining agreement, unless the union waives or bargains away that right through the collective bargaining process or inaction. While the Board has long held that a union's waiver of the statutory right to bargain must be “clear and unmistakable,” *see Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), it is also true that the waiver need not be expressed *in haec verba* within the collective bargaining agreement. *See, e.g., Manitowoc Ice, Inc.*, 344 NLRB 1222, 1222, 1234-36 (2005) (affirming ALJ’s ruling that union waived right to bargain, even though “there is nothing within (or absent from) the . . . contract itself that demonstrates that the Union waived its right to object to the unilateral action of the Respondent.”).<sup>15</sup>

It is on this point that the ALJ’s decision errs as a matter of law. Specifically, “[a] waiver may also be inferred from extrinsic evidence of contract negotiations and/or past practice.” *Kiro, Inc.*, 317 NLRB 1325, 1328 (1995). *See also American Diamond Tool*, 306 NLRB 570, 570 (1992) (“Waivers can occur in any of three ways: by express provision in the collective

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<sup>15</sup> The General Counsel's office itself has stated:

The requirement that a waiver of bargaining rights be “explicitly stated” does not, however, require that the action be expressed *in haec verba* in the contract. . . . As *Provena* illustrates, when a contract does not specifically mention the action at issue, the Board will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver. In interpreting the parties' agreement, the relevant factors to consider include: (1) the wording of the proffered section of the agreement(s) at issue; (2) the parties past practice; (3) the relevant bargaining history; (4) any other provisions of the collective bargaining agreement or other bilateral arrangements that may shed light on the parties' intent concerning bargaining over the change at issue.

*BP US Pipelines*, Office of the Gen. Counsel Advice Mem. Case 16-CA-27232 (Dec. 7, 2010); *EMI, Inc.*, Office of the Gen. Counsel Advice Mem. Case 21-CA-38846 (Jan. 24, 2011).

bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two.”) (quoting *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982)). Applying this standard, the Board repeatedly has held that a Union has waived or bargained away its right to negotiate over a mid-contract unilateral action based on negotiating history or past practice between the parties. Accordingly, the ALJ’s reliance in this case on *New York Mirror*, 151 NLRB 834 (1965), and *Teamsters Local 71*, 331 NLRB 152 (2000), is unavailing, as neither of those cases addressed the issue of whether the parties past practice or relevant bargaining history demonstrated a waiver. Indeed, *New York Mirror* held that it was error for the Trial Examiner *not* to have considered evidence of past practice. 151 NLRB at 841.

As we set out below, by failing to consider the past practice and bargaining history of the parties, the ALJ failed to apply properly this well-established precedent. *See supra* note 4. A review of the practices and bargaining history of Unit 1 and ALPA compel the conclusion that Unit 1 has clearly and unmistakably waived its right to bargain over both the decision and the effects of the reductions-in-force at issue in this case.

**B. The Past Practice of ALPA and Unit 1 Demonstrates that Unit 1 Waived the Right to Mid-Term Bargaining Over Layoffs.**

1. Prior to 2009, Unit 1 *never* requested mid-term bargaining over RIF decisions or effects. Tr. 446:25-447:17. As Wayne Klocke acknowledged, Unit 1’s about-face in 2009 was the result of a “change in philosophy” within Unit 1.

The record evidence presented during the ALJ hearing showed that ALPA implemented reductions in force in 1985, 1994, 1996, 1999, 2002, 2003, 2004, 2005, and 2008. These prior RIFs occurred under remarkably similar circumstances to the 2009 RIFs challenged in this case in that they were all motivated by financial difficulties and by changes to the “footprint” of the

union (*e.g.*, loss of member airlines). They each also affected a similar number of employees (*e.g.*, eight employees in 1994; five in 2002; six in 2003; and fifteen in 2008, *see* R. Exh. 22). Moreover, at the time of each of the RIFs, the only provisions in this Agreement regarding layoff or job abolishment were included in Section 11 of that Agreement. R Exh. 8 at ALPA 000271; *See* GC Exh. 42 (2004-2009); R. Exh. 13 (2000-2004); R. Exh. 10 (1996-1999) R. Exh. 8 (1992-1995); R. Exh. 11 (1983-1986).<sup>16</sup> Unit 1 never demanded bargaining over the decision or the effects of any of these RIFs, including no discussion concerning which specific employees would be laid off; nor did Unit 1 ever suggest that ALPA did not have the right to make these decisions unilaterally, so long as ALPA provided the affected employees with the post-employment benefits already negotiated and set forth in Section 11 of the CBA. Tr. 317:23-318:7; 318:15-23; 371:2-12 (testimony by former member of Unit 1's negotiating committee that Unit 1's "position" was "that we're not involved in the RIF process"); 410:14-21; 411:10-16, 21-25; 593:22-25.

Most probative of this well-established past practice between ALPA and Unit 1 was the 2008 layoffs. These layoffs occurred under exactly the same collective bargaining agreement as the 2009 layoffs at issue in the General Counsel's Complaint. The 2008 layoffs were, indeed, even more extensive than the 2009 layoffs, as fifteen Unit 1 employees were affected. R. Exh. 22. And, like the 2009 layoffs, the 2008 layoffs involved both headquarters employees that were not tied to a particular airline, and employees at out-based offices that were associated with specific member airlines that were lost. R. Exh. 22; R. Exh. 36; Tr. 589:1-3. Unit 1 never demanded bargaining over ALPA's decision to lay off any of these fifteen Unit 1-represented

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<sup>16</sup> Prior to the 1992-1995 Agreement, Section 11 was codified at Section 10. The layoff/reduction in force provisions in the 1983-1986 Agreement can thus be found at Section 10.

employees, nor did Unit 1 file any unfair labor practice charge challenging ALPA's unilateral action in this regard. Tr. 317:23-318:7; 318:15-23; 593:22-25.

2. The ALJ, in a footnote, attempted to argue that ALPA did bargain with Unit 1 over the decision to abolish positions in 1994-95 and in 2004. *See* ALJD 9 n.12:43-51. This finding is belied by the factual record.

For example, the ALJ found, based on Patrick Brennaman's testimony, that ALPA bargained with Unit 1 over the 1994-1995 layoffs and their effects. To the contrary, ALPA presented Unit 1 with the option of opening up the contract *or* ALPA laying off employees (without Unit 1's input). Tr. 527:5-528:6; 774:13-20. ALPA conceded that ALPA could not reopen the contract – modifying the terms and conditions of employment but avoiding layoffs – without Unit 1's consent because it would mean changing a term or condition of the existing contract, Tr. 527:17-528:6; 531:1-5. Thus, ALPA presented Unit 1 with two “take it or leave it” proposals. R. Exh. 5. When Unit 1 rejected those proposals, ALPA laid off Unit 1 members. It did not negotiate in any way, nor did Unit 1 demand that it negotiate, over who those individuals would be, how they were chosen, the effects of the layoffs, or anything else related to the layoffs. Tr. 528:10-25. In fact, Unit 1's response to ALPA made clear that Unit 1 *never believed it had the right to demand bargaining over the layoffs*. For example, in its November 1994 letter to Unit 1, ALPA stated that it was seeking the union's input as “an alternative to acting on the contractual reduction in force provision of the [collective bargaining agreement].” R. Exh. 5 at ALPA 012799. Not only did Unit 1 not contradict ALPA's statement that *the contract provided for reductions in force*, but in fact, the oral response conveyed by Unit 1 was “ALPA's going to do what it's going to do.” R. Exh. 6. As such, the ALJ erred when finding that ALPA had bargained over the 1994-95 layoffs.

The same conclusion follows from a review of the record evidence regarding the 2004 job abolishments in ALPA's print shop—the other instance in which the ALJ found the parties to have bargained over a reduction in force. In 2003, ALPA began looking for a buyer for its print shop. The buyer found by ALPA was willing to offer job protection for most of the print shop employees, in return for an agreement that ALPA would guarantee the firm a retainer fee to cover the salaries. GC Exh. 72; GC Exh. 73. ALPA met with Unit 1 and the other staff union (Unit 2) on December 15, 2003, seeking agreement from the unions that they would waive the contractual severance provisions in these circumstances, as ALPA could not go forward if it had to “pay twice” for these employees. GC Exh. 72 at ALPA 12011. Unit 1 voted to reject this offer. GC Exh. 73 at 3. As a result, ALPA closed the print shop, following the terms set forth in Section 11 of the collective bargaining agreement. *Id.* As with the other RIFs, Unit 1 did not demand bargaining over this decision, or over the effects of this decision on the RIF-ed employees, or in any way suggest that ALPA lacked the right to make these decisions, provided ALPA following the terms of the existing contract.

In sum, neither of those prior instances demonstrate that Unit 1 ever demanded bargaining over the decision to implement a RIF or the effects of a RIF. Instead, those instances identified by the ALJ further demonstrate that Unit 1 simply *did not* demand to bargain – at any time midcontract – in response to the repeated and consistent practice of laying off Unit 1 members in response to financial pressures. Instead, these layoffs were a regular occurrence in a cyclical industry. A clear and unmistakable waiver may be inferred from this fact alone.

3. Not only did the ALJ misstate the factual record, he also misapplied applicable Board precedent. Specifically, contrary to the conclusion of the ALJ, the case of *California Pacific Medical Center*, 337 NLRB 910 (2002), is directly on point.

a. In *California Pacific Medical Center*, the Board affirmed the Administrative Law Judge’s ruling that the employer had no duty to bargain over the decision to lay off employees because “the past practice of the parties demonstrates that the Respondent has historically exercised, on numerous occasions, the right to lay off without prior bargaining about the decision to do so” and “[a] clear and unmistakable waiver may be inferred from [this] past practice.” *Id.* at 914. The employer had notified the union of multiple layoffs over a four year period and, in the Board’s view, “it is unlikely that in each and every past layoff situation the Union would have elected not to assert a right to engage in decision bargaining if it believed it had that right.” *Id.*<sup>17</sup> See also *Mt. Clemens General Hospital*, 344 NLRB 450, 460 (2005) (“A waiver can be inferred here from the undisputed evidence showing that the Union never bargained over any [tax shelter annuity program] changes, never requested to bargain over them, and never objected to any of the changes.”)<sup>18</sup>

b. As in *California Pacific Medical Center*, ALPA had notified Unit 1 of numerous layoffs over a period of many years, and Unit 1 had never once demanded bargaining or suggested it had a right to bargain over the decision to engage in layoffs, or the effects. Indeed, the past practice

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<sup>17</sup> The case of *Owens-Corning Fiberglas*, 282 NLRB 609 (1987), relied upon by the ALJ for the proposition that a union's past acquiescence in a unilateral action is not a waiver for all time, is not to the contrary. *Owens Corning Fiberglas* involved a unilateral change to an employee discount purchase program; in its decision, the Board cited only one single past instance in which the employer had acted unilaterally with respect to that program. *Id.* at 610. Failure to challenge a single unilateral action does not constitute a waiver; however, a pattern of acquiescence over a period of years, as seen in *California Pacific*, is probative of waiver.

<sup>18</sup> The Board has also held that “a unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo—not a violation of Section 8(a)(5).” *Courier-Journal*, 342 NLRB 1093, 1094 (2004) (no violation of the Act where employer refused to bargain over changes to health care plan, where “[f]or some 10 years, the Respondent had regularly made unilateral changes in the costs and benefits of the employees' health care program, both under the parties' successive contracts and during hiatus periods. . . [and i]n each instance, the Union did not oppose the Respondent's changes.”). See also cases cited in *Caterpillar, Inc., Div. of Judges*, 13-CA-43506 (Feb. 2, 2007).

here—stretching back over twenty years—is far more established than was the past practice in *California Pacific Medical Center*. The Board’s observation in this case that, “it is unlikely that in each and every past layoff situation the Union would have elected not to assert a right to engage in decision bargaining if it believed it had that right,” 337 NLRB at 914, is particularly applicable here. Specifically, it is undisputed that Unit 1 did not agree with the wisdom of these past RIFs or see them as inevitable, stating that it considered the RIFs “unnecessary” (R. Exh. 7), that it was “disturbed” by them (R. Exh. 23 at ALPA 7844-45), that the RIFs “evoked lots [of] response from membership,” *id.* at ALPA 7864, and that the RIFs were “very much on the minds of our members,” *id.* at ALPA 7866. Given this strongly expressed dissatisfaction, it is even more “unlikely that in each and every past layoff situation the Union would have elected not to assert a right to engage in decision bargaining if it believed it had that right.” 337 NLRB at 914.

These facts are themselves sufficient to demonstrate waiver under established Board precedent. However, as shown below, this well-established past practice does not stand alone, as the bargaining history between the parties leads to the same conclusion.

**C. The Bargaining History Demonstrates that Unit 1 Waived the Right to Mid-Term Bargaining Over Layoffs.**

1. The Legal Standard

For more than fifty years, the Board has held that a waiver of the statutory right to bargain may be found based on the collective bargaining history between the parties, and particularly on a union’s unsuccessful attempt to obtain a contractual guarantee regarding the matter at issue. In *Speidel Corp.*, 120 NLRB 733 (1958), the Board found that “the Union ‘bargained away’ or waived, its interest” in mid-contract negotiations over previously paid holiday bonuses based on proposals and discussions at the bargaining table. *Id.* at 741. In that case, the employer had a long-standing tradition of paying holiday bonuses, which it had always

viewed as a “management prerogative.” In the penultimate contract negotiations, the union proposed a “Maintenance of Privileges” clause, which the employer rejected, stating that it did not wish to convert the holiday bonuses into a contractual right, as the employer viewed these as a “management prerogative.” *Id.* at 740-41. The union's acceptance of a contract without this clause was held to constitute waiver of the right to bargain over the elimination of these bonuses.

Similarly, in *International News Service Division*, 113 NLRB 1067 (1955), the Board held that the union had waived its statutory right to receive information relating to discretionary wage increases provided to unit employees because the union had proposed, and later withdrawn, proposals that it be consulted on the wage increases and that it be provided with the information at issue in the Board charge:

[T]he controlling fact that clearly emerges from the entire course of the parties' bargaining is that the Union, having proposed an “information” clause for the 1953-55 contract more inclusive than the one in the 1952-53 contract, consciously yielded in the face of the Respondent's objections, and accepted something less than it originally proposed. . . . In these circumstances, we believe it would be an abuse of the Board's mandate to throw the weight of Government sanction behind the Union's attempt, some 3 months later, to disturb the terms of the bargain the parties themselves achieved.

*Id.* at 1071. *See also Radioear Corp.*, 214 NLRB 362, 364 (1974) (Board found a waiver of right to bargain over discontinuation of holiday bonus based in part on fact that “parties . . . fully explored the possible continuation of certain specific existing benefits” during negotiations, and “as to at least one, the Christmas bonus, there was a ‘buy out’ for higher wages”); *New York Mirror*, 151 NLRB at 840-41 (holding that “for example, if it were to appear that after full exploration of the subject during prior negotiations the Unions had consciously yielded their interest to be notified about the permanent suspension of the Mirror's operations in return for the severance and termination provisions, a finding of clear and unmistakable waiver might well be

justified.”); *NTN Bower Corp.*, 356 NLRB No. 141, \* 97 (Apr. 20, 2011)(waiver may be found where contract language not specific but bargaining history demonstrates waiver).

In *Manitowoc Ice, Inc.*, 344 NLRB 1222 (2005), the Board employed slightly different reasoning--relying on “long recognized . . . principles of equitable estoppel” – to find that an employer was privileged to unilaterally change a condition of employment, where the union’s conduct “led [the Employer] to reasonably believe that it could deal unilaterally with the subject.” *Id.* at 1223. In that case, the employer had made several changes to its profit sharing program over the forty year history of the program, without bargaining with the Union over those changes and without complaint from the union. *Id.* at 1222, 1227. During the last round of contract negotiations, the union had sought to guarantee the profit-sharing plan in its then-current form, due to the fact that the employer had recently changed the program for its non-bargaining unit employees and its members were “nervous” about potential changes. The employer refused the union’s proposal, explaining that it viewed the plan as a management prerogative. *Id.* at 1223, 1224, 1234. The Union “reasserted its proposal a few times before dropping it, but did not challenge the Respondent’s position and ultimately entered into a new collective-bargaining agreement that did not contain any reference to the profit-sharing plan.” *Id.* at 1224. The Board concluded that there was a “‘clear understanding’ that the profit-sharing plan would remain a management prerogative, and that the Union, by its conduct . . . ‘bargained away’ its interest in the plan.” *Id.* The Board further held that “[b]y challenging the Respondent’s unilateral changes to the plan, after abandoning its effort in collective-bargaining to make the plan a contractual

benefit, the Union is, in effect, attempting to deprive the Respondent of the benefit of its bargain.” *Id.*<sup>19</sup>

## 2. The Bargaining History Between ALPA and Unit 1

In this case, the undisputed record shows that *both* parties clearly understood that ALPA had discretion to abolish positions, and that there was no obligation to bargain over or to provide benefits in excess of those specifically negotiated by the parties and set forth in Section 11 of the CBA. As shown above, that discretion has been quite frequently exercised, and has not been challenged or even questioned in *any* of the numerous mid-term reductions-in-force undertaken in the parties’ history prior to 2009, including some that were of equal magnitude as the 2009 layoffs. What is more, and in what proves fatal to the ALJ’s decision, Unit 1 repeatedly sought through contract negotiations to impose restrictions on ALPA’s discretion to engage in layoffs and select individuals for layoff. Significantly, after substantial negotiation, Unit 1 repeatedly retreated from that position in favor of obtaining other rights for its members (including increasingly generous benefits for those workers who were selected for layoff). Unit 1’s efforts to obtain contractual restrictions on ALPA’s right to lay off would be superfluous if, as the ALJ concluded, Unit 1 possessed the right to bargain over these decisions.<sup>20</sup>

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<sup>19</sup> Significantly, the Board made this finding even though the union did not obtain any *quid pro quo* for dropping its proposal regarding the profit sharing plan-- – indeed, the union had attempted to obtain improvements to the retirement plans in exchange for dropping the profit sharing proposals, but the employer rejected those proposals as well. 344 NLRB at 1235.

<sup>20</sup> The ALJD found that ALPA argued that Section 8 of the parties 1992-1995 collective bargaining agreement, R. Exh. 8., included a management rights clause. 9:39-40. ALPA made no such argument, nor does it now. To the contrary, ALPA argued that one reason the rejection of its proposed so-called “management rights” clause was insignificant was because the clause simply reiterated all in one place rights that ALPA already had. Among these were the rights to “discipline, suspend or terminate employees for just cause,” explicitly contained in Section 8 of the 1992-1995 contract, R. Exh. 8 at ALPA 261.

a. The layoff issue was particularly central during the 1995-1996 bargaining and the 2004 bargaining, both of which came on the heels of significant layoffs, discussed *supra*, Section I B.2.;Tr. 390:6-12 (during 1995-96 bargaining, reductions in force “clearly an issue at the negotiating table. We had just come off of this reduction in force, and there was considerable discussion about greater protections in the severance benefit area.”); Tr. 405:15-406:3 (Unit 1 2004 negotiating committee told ALPA that they had “just come off of the layoffs, [and] it was a major concern of the unit . . . . Particularly [Unit 1] wanted to protect the more senior employees.”). Indeed, on the very first day of negotiations, March 8, 2004, in setting forth Unit 1’s priorities for the negotiation, Unit 1’s lead negotiator, Bob Nichols, observed that Unit 1 was down eleven jobs, that it was “disturbed about job abolishments,” and that Unit 1 would be making proposals on both severance and scope. R. Exh. 23 at ALPA 7844-45. Similarly, in making Unit 1’s opening proposal on Section 11 during the 2004 negotiations, on March 9,

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As to the management rights clauses that ALPA proposed in 1992 and 1996, *see* Tr. 454:20-455:5; GC Exh. 63, any force these proposals (which did not appear to have been greatly discussed at the bargaining table) may have is much blunted by the fact that, over the next thirteen years and three rounds of bargaining, ALPA did not ever seek to re-introduce this proposal. More to the point is, as discussed above, that, by its terms, this proposal plainly included a restatement of rights that ALPA already had—such as the right to hire employees, or the right to “discipline, suspend or terminate employees for just cause” (explicitly contained in Section 8 of the Contract, R. Exh. 8 at ALPA 261). Moreover, in rejecting this proposal, Unit 1’s negotiators stated that ALPA did not need a management rights clause, because management rights clauses are for employers that have a bad relationship with their union, which ALPA did not. Tr. 477:19-478:5.

The ALJD makes much of the difference between the Unit 1 contract, which lacked such a clause, and the Unit 2 agreement, which has one. ALJD 8:34-36 (citing GC Exh. 62). This emphasis is misplaced. As explained above, the bargaining history and past practices between two parties – on the one hand, ALPA and Unit 1, or, on the other hand, ALPA and Unit 2 – shapes the content and meaning of the provisions to which they agree. There was no evidence introduced at the hearing about the relationship between Unit 2 and ALPA, and the ALJ therefore erred by relying on the Unit 2 agreement without a factual record on that relationship.

Nichols stated that severance had “evoked lots [of] response from [the Unit 1] membership.” *Id.* at ALPA 7864, 7866

Reviewing the bargaining history from these two sessions leaves no doubt that the matter was a significant one for Unit 1, and that substantial effort was put into fully exploring the circumstances under which ALPA could layoff Unit 1-represented employees, including the “methodology” (using Unit 1's word) for any RIF. R. Exh. 23 at ALPA 7932

In its October 19, 1995 proposal, Unit 1 proposed both increased benefits for severed workers (increasing the notice period for job abolishment; increasing the severance pay for RIFed employees; limitations on ALPA's ability to provide “Flight Pay Loss” to members to provide services after abolishing Unit 1 positions; providing job placement services for employees whose positions had been abolished) and creating a new system of departmental seniority to be used in conducting job abolishment. R. Exh. 9 at ALPA 001565-66.

As Johnson testified, ALPA “resisted” Unit 1's efforts to create a seniority-based layoff system:

[S]eniority has been an issue just throughout . . . my negotiating life with ALPA<sup>21</sup>. . . [W]e represent airline pilots where they live and die by seniority . . . . [T]here's a difference, though, within ALPA the Union itself because we do not have fungible positions. A pilot is trained standard training to fly something. We have lawyers and they're different. . . I deal mostly in the aviation regulatory area. And so you can't, without a lot of build-up, put[ ] a lawyer that's a contract administrator in to do my job[,] and vice versa.

Tr. 395:22-396:17. Although ALPA rejected Unit 1's proposal for departmental seniority, on December 18, 1995, Unit 1 again proposed increasing the notice period (from 2 weeks to 2 months), and again proposing a detailed seniority system for job abolishment. R. Exh. 9 at

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<sup>21</sup> Kelly Collie similarly testified that “the issue of seniority-based RIFs has come up many, many times in the bargaining relationship.” Tr. 538:18-20.

ALPA 1537, 1545-49, 2776-79. ALPA refused but, in return, offered to increase the notice to one month, provide job placement services, and to provide notice of vacancies for one year to any former employee whose position had been abolished. *Id.* at ALPA 1412, 1414-15. A month later, on January 19, 1996, Unit 1 withdrew its proposal for seniority-based job abolishment and, instead, proposed substantial increases in severance pay (two months per year of service, up to fourteen months). *Id.* at ALPA 1523-24. In the resulting agreement, ALPA agreed to substantial improvements in the rights accorded to laid-off employees, including an increase in the ceiling on severance pay from ten months to twelve months salary, allowing employees to take severance as a lump sum, doubling the notice period, providing job placement assistance, and providing notice of new and vacant positions to employees affected by job abolishment for two years after the abolishment. R. Exh. 10 at ALPA 349.

The 2004 negotiations proceeded in a similar fashion. In its opening proposal, Unit 1 again proposed both substantial improvements in severance benefits and practices (doubling the severance cap to a full two years' salary, doubling the paid notice period to two months, increasing the time in which ALPA would provide laid-off employees with announcements of job vacancies to five years) as well as creating a reverse seniority system for job abolishments. R. Exh. 23 at ALPA 7864-65. Unit 1 stated that this seniority system would function as a bumping system, under which "the guys out the door are the junior guys." *Id.* Jim Johnson, speaking for ALPA, again explained that such a seniority or bumping system was "impossible" for ALPA to live with due to the specialization of individual professions. For example, he explained, "one engineer can't necessarily replace another." *Id.*; *see also* Tr. at 407:15-408:12.<sup>22</sup>

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<sup>22</sup> Kelly Collie's testimony echoed this same point, explaining that "even in the same job title, like a contract administrator for example, there are different types of expertise. Some are great negotiators. Some are great contract enforcement folks. . . . [T]hey have different skills.

Nichols further argued that if ALPA would “RIF by seniority, [ALPA’s] costs will” go down. R. Exh. 23 at ALPA 7866. Jan Briel, the Human Resources Director at the time, responded that ALPA is “a performance organization, not a seniority organization.” Nichols expressed Unit 1’s understanding that job abolishment at ALPA is “cyclical” and “will happen again,” then reiterated that job abolishment was “very much on the minds of our members” and was the “#1 response for over 70%” of members. *Id.*

The layoff issue remained a contentious issue for the negotiations for weeks. On March 19, Unit 1 reiterated its proposal for seniority-based layoffs, as well as doubling the maximum severance paid and providing laid-off employees and their families with group health insurance for severance period. *Id.* at ALPA 7875; R. Exh. 12; R. Exh. 39 at 4. On March 31—the day of contract expiration—Nichols reiterated that one of Unit 1’s goals was that it “must make it more difficult for ALPA to RIF [senior] people.” R. Exh. 23 at ALPA 7928. Later that day, Nichols again stated that Unit 1 was “committed to get something” on severance, including both a “methodology” for RIFs and increased severance amounts. *Id.* at ALPA 7932. On April 6, Nichols again stated that Unit 1 needed to “make it more difficult, optically, [for ALPA to] get rid of long term [employees,]” and that this was an issue that was “huge for [Unit 1’s] membership.” *Id.* at ALPA 7943. According to Nichols, Unit 1 “hearts [were] fluttering in Canada and [Pittsburgh]” over the prospect of additional job abolishments, which specifically was why Unit 1 was proposing the seniority-based provision. *Id.* at ALPA 7948. ALPA and Unit 1 continued to discuss the job abolishment provisions throughout that last day. Other than compensation, the layoff provision was the last item on which the parties came to agreement. *Id.* at ALPA 7961.

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Beyond that, we service the members of . . . approximately 40 different airlines, and there’s an expertise that goes along with those contracts and a history and a knowledge.” Tr. 540:6-21.

In the resulting agreement, ALPA ultimately agreed to increase benefits for laid-off employees and their families – including providing group health insurance for the period of severance (new Section B), R. Exh. 14 at ALPA 566. ALPA even met Unit 1 part-way on Unit 1’s desire to make it more difficult for ALPA to RIF more senior employees, by agreeing to provide “additional severance, in the amount of one (1) month per two (2) years of service beyond 12 years, . . . paid at 50 percent, up to a maximum of six (6) months” for employees with twenty or more years of service. R. Exh. 14 at ALPA 566. In light of ALPA's changed position, Unit 1 agreed to a contract without the seniority layoff provision that had been so central to negotiations. The 2004 negotiations resulted in the basic agreement that was in effect during the 2009 layoffs at issue in this case, as that agreement was ultimately extended through March 31, 2009.<sup>23</sup>

b. The 2008 negotiations over this extension further confirm that both ALPA and Unit 1 understood that they were bargaining over the rights and restrictions on ALPA's ability to engage in layoffs over the upcoming year. A “central focus” of the Unit 1 proposals in 2008 was layoff, which was described by Unit 1 as being a “ratification, high profile” issue for its membership. Tr. 556:12-17; 565:12-14; R. Exh. 25 at ALPA 6503. It was well known that, in addition to the continuing financial troubles in the airline industry, ALPA might lose a large airline (USAirways), and that two other airlines might merge, resulting in the likely elimination of an ALPA office. Accordingly, it was openly discussed at the table that job abolishment was

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<sup>23</sup> The fact that Unit 1 and ALPA engaged in another round of contract bargaining, in 2008, prior to the 2009 layoffs does not dull the force of the bargaining history from 2004. The Board’s jurisprudence does not draw any hard line between negotiations that occurred in the last round of contract bargaining, versus those that occurred in earlier rounds. *See, e.g., Speidel Corp.*, 120 NLRB 733, 740-41 (1958) (finding waiver based on a contract proposal introduced and then retracted by the union in the penultimate contract negotiations prior to the unilateral action).

likely during the upcoming year. *E.g.*, Tr. 537:8-15 (Collie communicated to Unit 1 “there is no way that we could keep everybody” if ALPA lost USAir); Tr. 557:8-17 (parties discussed that job elimination was “virtually certain” if ALPA lost USAir); Tr. 557:15-23 (Unit 1 stating that its proposals were “in case [an] office closes”); Tr. 558:10-15 (Unit 1 stating that it knew that “ALPA was likely to make changes” and expected that “[ALPA] would need to close [offices]).”

ALPA plainly stated to Unit 1 that, when and if the time came, it would exercise its managerial discretion to select employees for layoff, telling Unit 1’s negotiators that ALPA would be “evaluating [employees’] skills/experience [with] ALPA’s needs” when making layoff decisions. R. Exh. 25 at ALPA 6508. Unit 1 did not make any statement suggesting that it disagreed with ALPA’s assertion that it had the right to do so under the then-existing contract language, or otherwise state that it would reserve its right to demand bargaining. Unit 1’s position, to the contrary, was that ALPA should provide its laid off employees with additional benefits, including recall rights. Again, ALPA agreed to substantial improvements sought by Unit 1, including, for the first time, a detailed recall and preferential rehire right, in order to reach a consensual agreement without sacrificing its ability to implement layoffs at its discretion. What emerges from these facts is that towards the end of each round of negotiations, Unit 1 made the same strategic decision—to retreat from its proposals to limit ALPA’s discretion to select positions for layoff in favor of achieving other benefits for its members, including severance benefits that “ma[de] it more difficult” for ALPA to “get rid of long term [employees,]” one of Unit 1’s goals with respect to layoff methodology. R. Exh. 23 at ALPA 7943. And, in each of these negotiations, ALPA agreed to substantial concessions sought by Unit 1 in order to reach agreement with Unit 1 without sacrificing the managerial discretion that it believed to be essential to its operation.

In this context, it is plain that Unit 1 “bargained away or waived its interest” in mid-contract negotiations over layoffs in exchange for substantial benefits and rights that would be provided to laid-off employees. Thus, both the layoff issue and the effects of those layoffs were “fully explored,” *Radioear*, 214 NLRB at 364, by the parties at the bargaining table, and Unit 1 “consciously yielded in the face of Respondent’s objections,” *International News Service Division*, 113 NLRB at 1071, its proposals to limit ALPA’s ability to layoff employees in exchange for substantially improved benefits for laid-off employees. This is precisely the sort of bargaining that the Act is meant to encourage. This is not a case where a nebulous or theoretical matter is briefly raised by a party at the bargaining table. To the contrary, the specter of layoffs was concrete and understood by the parties, and the question of what would happen in the event ALPA needed to make further reductions in force, including by closing offices, was at the forefront of the issues that ALPA and Unit 1 grappled with at the bargaining table.

As feared and expected by both sides, it did come to pass that ALPA determined it needed to engage in further reductions in force. In so doing, ALPA adhered to the terms of the bargain struck at the table. Significantly, Unit 1 itself had the opportunity and the right to upset the terms of this bargain by invoking the “schmuck insurance” reopener clause that it had successfully sought in the 2008 extension negotiations, as the approval of the Delta-Northwest merger in October 2008 triggered that reopener option. Had Unit 1 invoked the reopener clause, the substantial benefits it had achieved for its laid-off members would, of course, also have been open for re-negotiation. Unit 1 made a choice to stick with the contract it had bargained. It then attempted to have it both ways by demanding bargaining over the 2009 layoffs, including the Minneapolis layoffs that were directly the result of the Delta-Northwest merger explicitly covered by the “schmuck insurance” reopener clause.

In these circumstances, the ALJ erred as a matter of law. His decision ignores entirely both the long line of Board precedent holding that a waiver of the statutory right to bargain may be found based on the collective bargaining history between the parties. His decision runs squarely into the Board's decision in *International News Service Division* where the Board stated that "it would be an abuse of the Board's mandate to throw the weight of Government sanction behind the Union's attempt . . . to disturb the terms of the bargain the parties themselves achieved," *International News Service Division*, 113 NLRB at 1071, as, "[b]y challenging the Respondent's unilateral [action], after abandoning its effort in collective-bargaining to [restrict the employer through contractual terms], the Union is, in effect, attempting to deprive the Respondent of the benefit of its bargain," *Manitowoc Ice, Inc.*, 344 NLRB at 1224. For those reasons, the ALJ's decision must be rejected.

## **II. ALPA DID NOT VIOLATE THE ACT WITH RESPECT TO GRITTNER'S LAYOFF**

Elaine Grittner was a benefits specialist who provided assistance to the Northwest Airlines MEC related to the benefit plans that covered Northwest pilots and their families. Tr. 628:8-12; Tr. 254:15-17. Northwest had merged with Delta in the fall of 2008, and the process of integrating the two airlines' benefits plans stretched out over 2009. Tr. 628:20-629:4. On November 6, 2009, Collie sent Unit 1 President Don McClure a letter advising Unit 1 that "Elaine Grittner's employment with ALPA will end on Friday, January 29, 2010." The letter further advised that

Commencing on January 1, 2010, all former [Northwest] pilots will be participants in the [Delta] health and benefit plans. Unfortunately, as a result of the merger of all pilots onto [Delta] plans, ALPA no longer needs a benefits specialist position to serve former [Northwest] pilots as all current [Delta] pilots will be served out of the [Atlanta] office by the current [Delta] benefits specialist.

GC Exh. 44.

The ALJ found that by failing to bargain with Unit 1 over the decision to lay off Elaine Grittner and over the effects of that layoff, ALPA violated Sections 8(a)(1) and 8(a)(5) of the Act. This finding is flawed.

First, the ALJ's decision must be reversed for the same reasons set forth *supra* at Part I – namely, that when Section 11 of the CBA is interpreted in light of the parties' past practice and bargaining history, it must be determined that Unit 1 waived any right to bargain mid-contract over these issues.

Second, the record evidence demonstrates that ALPA and Unit 1 did in fact bargain over Grittner's layoff. Specifically, in response to Unit 1's demand to bargain over the decision to abolish Grittner's position, and its effects, ALPA and Unit 1 set aside two days, on December 14 and 15, 2009, to discuss Grittner's situation and consider any mitigating proposals Unit 1 might have.<sup>24</sup> *See* Tr. 627:12-14 (noting that the parties agreed to meet “[t]o discuss options or alternatives to conducting a job elimination” for Grittner). ALPA and Unit 1 discussed a vacancy in Houston for a benefits specialist, but as Grittner was not willing to relocate from Minneapolis, it “significantly limited” ALPA's options. Tr. 627:20-628:4. Unit 1's own notes indicate that Collie told them that Grittner “could have Houston.” GC Exh. 43, 12/14/09 at 8. Iverson testified that Unit 1 “tried to propose a model position for her based upon that she could telecommute.” Tr. 220:5-6. Stated differently, Unit 1's proposal was to essentially invent a job for Grittner out of whole cloth. Collie pointed out that there were not funds budgeted for a new position (as Grittner's position had been paid for by the MEC, which did not want to spend its funds to cover a benefit specialist for plans that no longer existed). At the conclusion of the second day of discussions regarding Grittner, ALPA and Unit 1 were unable to reach any

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<sup>24</sup> When asked by Unit 1 if ALPA was bargaining, Jim Johnson, speaking for ALPA, said that was a “question for another agency” (*i.e.*, the NLRB) to determine. GC Exh. 43, 12/14/09 at 6.

agreement, and Russ Woody, speaking for Unit 1, stated that ALPA “can check the bargaining box [re EG] as unsuccessful.” Tr. 630:19-631:2; R. Exh. 35 at 10.<sup>25</sup> Following that meeting, on December 16, ALPA sent Grittner a letter informing her that her position would be abolished effective January 29, 2010. R. Exh. 17 at 46.

In sum, ALPA gave Unit 1 nearly three months notice of its intent to layoff Grittner. ALPA set aside two days to meet with Unit 1 to discuss this single employee. The parties exchanged proposals and caucused amongst themselves. ALPA listened to and considered Unit 1’s proposals with respect to Grittner. The parties were unable, though, to reach agreement. The ALJ’s finding that those facts do not satisfy any alleged duty to bargain to impasse is entirely without merit.<sup>26</sup>

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<sup>25</sup> While not addressed in the ALJ’s decision, the General Counsel and Unit 1 argued to the ALJ that Collie testified that ALPA had already determined a date to abolish Grittner’s position, when it met with Unit 1. Tr. 670:2-4. This testimony should not be used as evidence that ALPA did not engage in a process that was equivalent to bargaining with Unit 1; rather, the fact of the matter is that, given the fact that the Northwest benefits plans were ceasing to exist as of a date certain, and that Grittner had indicated she would not relocate, there did not appear to be any viable alternative to her layoff.

<sup>26</sup> While the foregoing is dispositive, we would be remiss if we failed to note that the decision to lay off Grittner adhered to the terms and conditions ALPA imposed on May 7, 2009, in which ALPA had agreed to maintain “not less than 156 Unit 1 positions so long as ALPA’s dues revenue remains in excess of \$22.5M” quarterly, and further agreed that:

In the event of a Reduction in Force (RIF), ALPA will provide ten (10) working days notice prior to the implementation of any RIF. Notice will include the number of affected positions and the aggregate salary amount. No Staff Employee shall be RIF’d until the ten (10) day period has elapsed. Upon request, ALPA will meet with Unit 1 to discuss the RIF. In the event a RIF is caused by loss of work, ALPA will consider any proposals for reallocation of work from non-Unit 1 personnel in order to avoid the RIF.

GC Exh. 34 at UALPAPAE 2096.

### **III. ALPA MET ITS STATUTORY OBLIGATION TO PROVIDE UNIT 1 WITH REQUESTED INFORMATION**

The ALJ found that that ALPA violated the Act by failing to provide Unit 1 information – or failing to provide the information in a timely fashion – about “which Unit 1 positions would be eliminated, the names of the employees who would be laid off, and a detailed explanation of how each Unit 1 employee laid off to date, or proposed to be laid off in the future was selected.” ALJD 4:6-10. To the contrary, the record shows that ALPA fully complied with any statutory obligations to provide information to Unit 1. Accordingly, the ALJ’s decision finding that ALPA’s conduct violated the Act must be reversed.

1. The ALJ’s decision fails at the threshold because ALPA had no duty to provide the requested information to Unit 1, because, as shown above, ALPA had no duty to bargain over the decision to layoff these individuals, or the process for selecting employees for layoff.

Under the Act, an employer is obligated to provide requested information to the union only where the information is relevant to the union’s performance of its duties as bargaining representative. The Board has repeatedly held that, where the employer has no statutory duty to bargain about a particular decision, the employer has no duty to furnish information relevant to that decision. *See, e.g., California Pacific Medical Ctr.*, 337 NLRB at 914 (employer had no duty to provide requested information requesting census and staffing data where employer had no duty to bargain over layoff decision); *BC Industries*, 307 NLRB 1275, 1275 n.2 (1992) (requested information related to reason for closing plan and disposition of customers and equipment need not be provided, where no obligation to bargain over decision); *Druwhit Metal Products Co.*, 153 NLRB 346, 347 (1965) (no obligation to provide information concerning sale of operation, where there was no obligation to bargain over sale). Because, as shown above, ALPA had no obligation to bargain over who would be selected for layoff, ALPA had no

obligation to provide the names of those selected, or information relating to the process by which those employees would be selected.<sup>27</sup>

2. Even if Unit 1 were entitled to the requested information, ALPA complied with its obligation by providing the Union with all information necessary and relevant to the Union's role as bargaining representative.

First, the evidence at the hearing established that, prior to both the January and February 2009 layoffs, ALPA provided Unit 1 with the number of positions that would be eliminated and the dollar amount that those positions cost ALPA. *See* GC Exh. 6, Tr. 77:23-78:8 (1/5/09 request for information); GC Exh. 5, 1/6/2009 at UALPAPAE 2548; GC Exh. 43, 1/6/2009 at 4 (immediate response, excluding specifics because there were none to share yet)<sup>28</sup>; GC Exh. 5, 1/7/2009 at 2, UALPAPAE 2556; Tr. 89:1-4 (ALPA giving information to Unit 1 President); GC Exh. 7 (chart delivered to Unit 1 President showing number of vacancies to be eliminated, number of unit members affected, and the total salary and FICA reimbursement associated with the elimination of both the vacant and occupied positions.);<sup>29</sup> R. Exh. 37 (1/13/09 response to 1/5/09 request for information, including list of all prior reductions-in-force); GC Exh. 8 (1/13/09 Unit 1 request for additional information); R. Exh. 16 (1/23/09 response to 1/13/09

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<sup>27</sup> There is no theory under which the *names* would be relevant to the decision to engage in layoffs. Presumably, the General Counsel's theory was that they were relevant in some way to the effects bargaining. The ALJ's decision does not address this issue at all.

<sup>28</sup> The Herndon names were not requested by Unit 1 until the day before the layoff, and therefore were provided within a day of the request. Tr. 305:20-306:5; GC Exh. 5, 1/7/2009 at 2, UALPAPAE 2556; Tr. 89:1-4. For the February layoffs as well, ALPA notified Unit 1 the day of the layoffs or shortly thereafter. Tr. 289:10-290:7. Though the ALJD seems to find that this notice does not "count," (5:20-26), it cites to no case standing for the proposition that providing the information the day of the layoff, only days after it was requested, is somehow untimely.

<sup>29</sup> This was exactly the same information that ALPA provided to Unit 1 in advance of the 2008 layoffs. R. Exh. 32.

request); GC Exh. 5, 2/9/2009 at 4 (discussing Minneapolis reductions in force by name and savings therefrom); GC Exh. 43, 2/9/09 at 3 (discussing Minneapolis reductions in force by name and savings therefrom). This information was sufficient to allow Unit 1 to formulate and make proposals to avoid or mitigate these layoffs, for instance, by proposing alternatives such as wage cuts, furloughs, seniority-based bumping rights, retirement incentives or voluntary leaves of absence (which Unit 1 did propose, *see supra* at Part I.B, C.2; *see supra* Background Facts Part II). The individual names were not necessary in order to formulate proposals.<sup>30</sup>

ALPA, moreover, did offer to give Unit 1 the names of the employees that were being considered for layoff in Minneapolis, if Unit 1 would agree to keep those names confidential pending a final decision and announcement. Tr. 428:7-10. Unit 1 flatly refused this offer, and did not even engage in a bargaining process over acceptable terms of confidentiality. Tr. 428:7-18.<sup>31</sup> ALPA's request for some type of confidentiality was a reasonable accommodation to sharing this sensitive information, which would necessarily have an impact on employee morale

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<sup>30</sup> Klocke testified that Unit 1 "needed to know the names so that we could talk to them and see if any of them were interested in job sharing, split schedules, early retirement, or some other mechanism that would avoid a furlough for somebody else or mitigate their damages." Tr. 101:6-10. However, the reality is that the names of those that were under consideration would in no way assist Unit 1 in this process. It simply makes no sense for Unit 1 to talk to those that would likely be RIF-ed to see if they were "interested in job sharing, split schedules [or] early retirement." The question is whether employees that were not targeted for layoff would be interested in taking early retirement or sharing a job with a colleague in order to save that colleague from a RIF. There were only twelve Unit 1 employees in Minneapolis, and ALPA had indicated that six or seven would likely be subject to the RIF. If Unit 1 were interested in exploring a possible proposal based on voluntary retirement or job-sharing, the sensible thing would have been to talk to all twelve Unit 1 employees in Minneapolis to determine if there was sufficient interest. This was something Unit 1 could do without the names.

<sup>31</sup> This marked another change from Unit 1's prior stance. In 2008, President Jay Wells had offered to keep the names confidential if ALPA was willing to share them, but ALPA was not willing to do so at that time. Tr. 673:10-12; GC Exh. 69.

and effectiveness.<sup>32</sup> Because Unit 1 failed to consider this request, or engage in bargaining over it, ALPA was privileged to deny Unit 1 the information. *See Northern Indiana Public Service Co.*, 347 NLRB 210 (2006).

Second, the evidence at hearing established that ALPA did explain, to the extent possible, “how each Unit 1 employee laid off to date, or proposed to be laid off in the future, was selected.” ALJD 4:6-10 As Collie testified at hearing, the selection process is a classic exercise of management discretion: there were no hard and fast rules, and no precise weighting of factors, that could be shared. Tr. 642:5-11. When asked at hearing what criteria were applied, Collie testified:

It's hard to say . . . It's our discretion. It's putting together what the priorities in the membership are and what our financial constraint are, and what the services are that we are continuing and/or discontinuing, and how we fit that all together.

Tr. 642:22-643:7. This is not a situation in which the employer determines layoffs by a particular system, such as performance evaluation rankings, and is refusing to share that system with the union. Here, where the decisions involved highly-trained professionals operating within specific labor-management relationships and performing a multitude of complex functions, the answer was simply that ALPA would look to the totality of each individual’s circumstances and apply its discretion: there was no “detailed explanation” of the selection process that could be articulated beyond that.

This answer was conveyed fully to Unit 1. When first asked on January 6 about how the Minneapolis decisions would be made, Collie told Unit 1 that factors such as the different cultures at the two airlines, which in turn would affect the workload, would be factors. GC Exh.

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<sup>32</sup> This is particularly so where the composition of the contemplated list might change, which, in this case, it did, as ALPA's initial forecast was for seven or eight positions to be eliminated in Minneapolis, GC, Exh. 5 2/9/2009, at 1, but only five employees were ultimately laid off, R. Exh. 17.

5, 1/6/2009 at UALPAPAE 2548; GC Exh. 43, 1/6/09, at 4. Collie's January 13 letter likewise informed Unit 1 that ALPA would work with the elected MEC officers to determine their staffing needs. R. Exh. 37 at 1. Iverson admitted in his testimony that ALPA informed Unit 1's negotiating committee during the February negotiations that "there was no objective criteria applied" by ALPA in the job abolishment process, and that ALPA instead looked at the individual employee's value to the organization and the pilots. Tr. 230:16-231:3.<sup>33</sup> As Iverson correctly observed, ALPA could "pick who [they] want to," based on the "valu[e]" to ALPA. Exh GC43 2/11/09 at 1. Klocke added that they had a "lengthy discussion" at the bargaining table about how ALPA's RIF decisions were driven by the fact that the employees "have different skill sets." Tr. 99:18-25.

3. It was plain, moreover, that Unit 1 not only understood this discretionary process, but opposed this exercise of discretion and believed that objective criteria – and specifically some type of seniority-based system – should apply. Over the years, Unit 1 had consistently opposed ALPA's exercise of discretion in this area at the bargaining table, and had repeatedly put forward proposals for a more objective layoff system. *See supra* at Part I.C, Background Facts Part II.C. This is precisely what Unit 1 did again in 2009. As Russ Woody expressed at the bargaining table, it was Unit 1's position in 2009—as it had been in previous rounds of bargaining—that ALPA should not have the discretion to "throw down thunderbolts wherever and whenever" it chose. *See* R. Exh. 15 at ALPA 12333. The information that ALPA provided to Unit 1—essentially that it could lay off whomever it decided should be laid off—was all that Unit 1 needed to evaluate and formulate its bargaining position.

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<sup>33</sup> ALPA had provided Unit 1 with this same information during the 2008 bargaining. *See* R. Exh. 25 at ALPA 6508.

#### **IV. ALPA’S IMPOSITION OF ITS LAST, BEST, AND FINAL OFFER ON MAY 7 WAS LAWFUL**

As set out in detail below, the facts are undisputed that, May 7, 2009—the date on which ALPA imposed its last, best, and final offer—ALPA and Unit 1 were deadlocked in their negotiations for a successor CBA. Indeed, the General Counsel and Unit 1’s counsel readily conceded this point at the hearing. *See* Tr. 156:18-25; 158:3-8. This deadlock followed extensive negotiations, which involved at least twenty-five bargaining sessions, spanning four months.<sup>34</sup> *See* Tr. 146:8-12. Each side presented many extensive and detailed proposals, and ALPA provided Unit 1 with extensive requested information. As Unit 1’s chief negotiator testified, the parties spent over a hundred hours in direct negotiations. Tr. 146:13-18. The parties were able to reach tentative agreements on a number of subjects, including difficult subjects such as compensation for the majority of employees, and health care for active employees. Ultimately, however, agreement foundered on three issues central both ALPA’s continuing financial viability and Unit 1’s goals in bargaining: compensation for senior employees, retiree healthcare, and job security. Thus, ALPA, the General Counsel, and Unit 1’s attorney all agreed that, by May 7, in spite of Unit 1 and ALPA’s exhaustive and lengthy efforts to reach an agreement, they were unable to do so. Tr. 156:18-25; 158:3-8.

Notwithstanding that all parties agree that the “prospects of concluding an agreement” had been exhausted, *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), the ALJ nevertheless found that ALPA’s imposition of its last best and final offer, on May 7, was unlawful, because the impasse ALPA asserts was reached was tainted by unremedied unfair labor practices—namely, (1) the purported unfair labor practice of refusing to bargain over layoffs and the effects of those

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<sup>34</sup> Negotiation sessions were held on 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.

layoffs (ALJD 15:31-32), discussed *supra* at I, and (2) the purported unfair labor practice of refusing to provide information requested concerning those layoffs (ALJD 15:32-35), discussed *supra* at III. According to the ALJ, those ULPs “changed the baseline for negotiations,” thereby making it “harder for the parties to come to an agreement.” ALJD 15:43-44. As we now show, the ALJ’s decision and findings are without any merit.

#### **A. The Legal Framework**

While it is true that “[i]n determining whether a good-faith impasse has been reached, the Board can consider whether ‘the purported impasse is reached in the context of serious unremedied unfair labor practices that affect the negotiations,’” *Lafayette Grinding Corp.*, 337 NLRB 832, 833 (2002) (quoting *Great Southern Fire Protection, Inc.*, 325 NLRB 9 n.1 (1997)), there is no “‘presumption that an employer’s unfair labor practice *automatically* precludes the possibility of meaningful negotiations and prevents the parties from reaching good faith impasse.” *Edward S. Quirk Co.*, 330 NLRB 917, 925 (2000) *enfd. in part and vacated in part*, 241 F.3d 41 (1<sup>st</sup> Cir. 2001), *affd. on remand*, 340 NLRB 301 (2003), (emphasis added) (quoting with approval *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982)) ; *see also Storer Communications*, 297 NLRB 296, 297 n.7 (1989) (same).

For unfair labor practices to taint an otherwise good-faith impasse, the unfair labor practice in question must (1) be “serious unremedied unfair labor practices that [a]ffect[s] the negotiations” *Alwin Mfg. Co.*, 326 NLRB 646, 688 (1998) *enfd.* 192 F.3d 133 (D.C. Cir. 1999), *and* (2) “‘there [must be] a causal connection between the previous unfair labor practices and the failure to reach an agreement.’” *Edward S. Quirk Co.*, 330 NLRB at 917 (quoting

*Dynatron/Bondo Corp.*, 326 NLRB 1170 (1998)).<sup>35</sup> Stated differently, “[t]he issue is whether the [employer’s unremedied unfair labor practice] contributed to the deadlock in such a manner as to prevent lawful impasse.” *J.D. Lunsford Plumbing*, 254 NLRB 1360, 1366 (1981), *aff’d. mem. sub. nom.*, *Sheet Metal Workers Local 9 v. NLRB*, 684 F.2d 1033 (D.C. Cir. 1982).

In *Dynatron/Bondo*, the Board identified two ways in which a serious unfair labor practice can prevent an otherwise lawful impasse:

First, a ULP can increase friction at the bargaining table. Second, by changing the status quo, a unilateral change may move the baseline for negotiations and alter the parties’ expectations about what they can achieve, making it harder for the parties to come to an agreement.”

*Dynatron/Bondo*, 333 NLRB at 752 (quoting *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 139 (D.C. Cir. 1999)). The ALJ’s decision finds that the ULPs prevented impasse on both grounds. As we now show, no reading of the record evidence and the longstanding Board precedent supports the ALJ’s decision.

**B. Even Assuming That ALPA Engaged In Unfair Labor Practices, Neither ULP Increased Friction at the Bargaining Table**

The ALJ’s decision found that ALPA’s May 7, 2009 decision to impose the terms of its last, best, and final offer was improper, because the purported ULPs—the refusal to bargain and/or the refusal to provide information—“changed Unit 1’s focus and made the negotiations

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<sup>35</sup> As the Board has noted, a *per se* rule would discourage employers charged with unfair labor practices from engaging in bargaining:

The Company and the Union had a dispute as to whether the original unilateral change was lawful or unlawful. They both undertook to bargain while that dispute was being adjudicated. . . . Industrial stability is enhanced when the parties to a dispute . . . sit down and bargain with each other. Such bargaining should be encouraged. Here the parties did just that, but now the Union claims that the Company’s bargaining was meaningless because the Company later lost the litigation.

*J.D. Lunsford Plumbing*, 254 NLRB at 1366.

more difficult . . . [by] creat[ing] a great deal of mistrust.” (ALJD 15:35-38). The purported “trust” issue was allegedly exacerbated by ALPA’s refusal to provide the names of the employees whose jobs would be abolished prior to their jobs being abolished. (ALJD 15:38-43).

A review of Board precedent makes clear that these facts fall short of the standard necessary to preclude an otherwise lawful impasse. In particular, although any unfair labor practice can be construed as “increas[ing] friction” and potentially “alter[ing] the parties’ expectations,” the Board requires that the unfair labor practice be both serious and have a substantive causal nexus with the impasse. Indeed, the Board has typically found that an unfair labor practice precludes impasse by increasing “friction at the bargaining table” only where the conduct was found to be “egregious” and “calculated to reduce union representation to inconsequentiality.” *E.g., Alwin*, 326 NLRB at 646. In *Dynatron/Bondo*, for instance, the employer’s unfair labor practices included the retaliatory discharge of five members of the bargaining committee and a vocal union supporter (in addition to unlawful surveillance of union activities), which the Board found “made it difficult for the Union to replace bargaining committee members because unit members feared retribution” and therefore “would tend not only to hinder the committee’s ability to negotiate, but also would reasonably lead it to believe that its very existence was under attack.” 333 NLRB at 752-53.

*Alwin*—the principal case relied upon by the ALJ—proves the point. There, the unfair labor practices included “continued unilateral action, . . . direct dealing with unit members . . . [and] threats to discharge and permanently replace . . . strikers,” among other conduct. 326 NLRB at 646. When taken collectively, these actions were “egregious.” *Id.* Moreover, the final offer that the employer implemented “included the two employment terms [new production standards and changes to the vacation policy] found to be unlawfully implemented” during the

course of bargaining. 326 NLRB at 646. Under these circumstances, the Board concluded that “no valid impasse had been reached in negotiations.” *Id.*

The facts of this case are distinguishable. Unlike *Alwin* and *Dynatron/Bondo*, there has been no allegation that ALPA’s refusal to bargain over layoffs or their effects attempted to undermine the union’s very existence or its ability to field a bargaining team. To the contrary, Unit 1 vigorously bargained with ALPA for hundreds of hours, over a period of months, following ALPA’s purported unlawful refusal to bargain over the layoffs.

The Board’s decision in *Aramark Educational Services, Inc.*, 355 NLRB No. 11, 25 (2010) is illustrative. In that case, the Board affirmed the decision of the administrative law judge that the employer violated Sections 8(a)(1) and 8(a)(5) of the Act when it unilaterally implemented a change “regarding verification of social security numbers for employees who have discrepancies in their social security numbers by disciplining employees who failed to correct such discrepancies.” *See id.* at 5. Moreover, the Board also found that the employer violated those same provisions of the Act when it refused to provide information to the union related to the change in policy. In other words, the ULPs at issue in *Aramark* are identical to the two purported ULPs in the instant matter. The ALJ in *Aramark*, as affirmed by the Board, found, though, that the impasse that was subsequently reached in bargaining was not “tainted” by those unremedied ULPs. *See id.* at 24. As the ALJ stated, the parties’ positions on the issue were “fixed” and were not “affected materially by Respondent’s unilateral implementation and enforcement” of the changed policy. *See id.* at 25. In short, the ALJ found that there was “no evidence that the violations created any friction above and beyond the friction that the proposed changes caused.” *Id.* Accordingly, the impasse that was declared was deemed lawful.

This same result follows here, because there is no evidence that the purported ULPs concerning a refusal to bargain and a refusal to provide information caused the parties to reach deadlock in their subsequent contract negotiations. Instead, and as we show below, it was inevitable that ALPA's right to engage in layoffs would become a major issue for Unit 1 in the 2009 negotiations, particularly given the fact that ALPA was seeking to engage in layoffs in Herndon and in Minneapolis (as opposed to the fact that ALPA refused to bargain over those layoffs). Moreover, even assuming a causal link between the two purported ULPs and the parties' inability to reach an agreement on job security, the ULPs can still not be found to be the cause of the deadlock, because the parties would still have failed to reach agreement due to their inability to reach agreement on retiree health issues. For those reasons, the ALJ's finding that the purported ULPs tainted the otherwise lawful impasse is without merit and must be reversed.

**C. Even Assuming ALPA Engaged In Unfair Labor Practices, Neither ULP Changed the Baseline in Bargaining and The Evidence Makes Clear That Parties Would Have Reached Impasse Without Regard To Any ULP**

The ALJ found that refusing to bargain over the layoffs and to provide certain information about them "changed the baseline for negotiations," thereby making it "harder for the parties to come to agreement." (ALJD 15:43-45). At the heart of the finding is that the unfair labor practice arose out of the layoff of unit employees, and that job security was one of the three issues on which the parties' deadlocked.

A long line of Board precedent makes clear that those facts fall short of establishing that either unfair labor practice caused the impasse. Significantly, the Board's admonition that unfair labor practices that "move the baseline" in negotiations so as to preclude lawful impasse has been applied only in limited circumstances—namely, where the changes put the union "under great pressure simply to restore the status quo" and "effectively moved the baseline for

negotiations to a considerably lower level.” *Lafayette Grinding Corp.*, 337 NLRB at 833 (employer unlawfully failed to make contributions to employees’ health care coverage, thereby depriving employees of health care coverage and creating a major issue for negotiations where one did not exist before).

A comparison of the leading cases is instructive. For instance, in *Dynatron/Bondo*, the employer made at least six unilateral changes and, as a result, “the Union could not formulate bargaining proposals based on a status quo because the Respondent, by repeatedly acting unilaterally and refusing to discuss its changes, kept terms and conditions of employment in a constant state of flux” and “forced the parties to focus on [the employer’s] changes. . . rather than on legitimate bargaining proposals.” 333 NLRB at 753.

In contrast, in *Litton Microwave Cooking Products*, 300 NLRB 324, 333 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), the Board held that an employer’s unfair labor practices--which included unilateral changes to employee meetings and holiday break-time, failure to grant a regularly-provided wage increase, three Section 8(a)(1) violations involving interrogation or overly broad no-solicitation rules, and five instances of discriminatory discipline--did *not* preclude a finding of genuine impasse. The Board explained that:

[W]e are reluctant to find bad-faith bargaining exclusively on the basis of a party’s misconduct away from the bargaining table. Typically, away from the table misconduct has been considered for what light it sheds on conduct at the bargaining table, but without evidence that the party’s conduct at the bargaining table itself indicates an intent[ion to avoid an agreement] it has not been held to provide an independent basis to find bad-faith bargaining.

*Id.* at 330. *See also id.* at 333 (“We find that, on a practical level, the [employer’s] unlawful conduct away from the bargaining table did not contribute to the deadlock in negotiations so as to prevent a lawful impasse”); *see also Edward S. Quirk Co.*, 330 NLRB at 924-25 (unfair labor

practices including failure to make payments into health insurance plan and statements regarding inevitability of health insurance co-pay did not cause impasse over proposed new health plan).

Furthermore, the Board has also held that an unfair labor practice will not preclude valid impasse, where the evidence establishes that the parties would have reached impasse without regard to the statutory violation. In *J.D. Lunsford Plumbing*, 254 NLRB at 1366, the Board found that the parties would not have come to an agreement even absent the unfair labor practice because “[n]o matter what the starting point of the Company’s offer the Union was simply unprepared to take anything less than it had obtained from [other employers].” *Id.* See also *Edward S. Quirk Co.*, 330 NLRB at 917, 925 (employer’s failure to make payments into existing health insurance plan during course of negotiations did not affect bargaining over proposed new plan).

When the facts of the instant case are applied to these standards, the ALJ’s finding that the General Counsel met its burden of proving a causal connection between any unfair labor practice and the deadlock in negotiations must be rejected.

1. ALPA’s Conduct Did Not Change the Baseline in Negotiations

Here, the record is devoid of any evidence that would suggest that ALPA was attempting to avoid agreement. Indeed, the fact that ALPA's conduct in making the layoffs in no way caused the deadlock between the parties is further evidenced by the fact that both sides freely made and bargained over proposals respecting future layoffs. ALPA and Unit 1 devoted several days to negotiating the layoff provisions of the successor contract, utilized the services of a federal mediator, and ALPA ultimately made major concessions on this front, accepting a totally new

“model” for reductions-in-force advocated by Unit 1 (*i.e.*, a restriction on ALPA’s ability to layoff unit employees through the imposition of a staffing floor).<sup>36</sup>

While Unit 1 attempted to argue at the hearing that the refusal to bargain and to provide information affected the negotiations, the bargaining history between the parties demonstrates that it was inevitable that Section 11, and ALPA's right to engage in layoffs, would be a major issue for Unit 1 in the 2009 negotiations, particularly given the fact of ALPA's desire to engage in layoffs in Herndon and Minneapolis (as opposed to the fact that ALPA refused to bargain over these layoffs). The undisputed testimony was that layoffs, and particularly protections for senior employees against layoff, were a recurring issue for the union. Tr. 395:22-396:17; 538:18-20; *supra* at Part I.B, I.C.2, Background Facts Pat II.B. This was particularly so whenever a round of bargaining followed a reduction-in-force. Each time, Unit 1 came to the bargaining table stating that job security, particularly for its more senior employees, was a “top priority”, “major concern” or “ratification.” issue. Given the scale of the RIF that occurred in 2008 (itself the largest RIF ever of Unit 1 employees), it is simply not credible that Unit 1 would not have

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<sup>36</sup> These facts are similar to those presented in *Edward S. Quirk Co.*, in which the Board adopted Judge Miserendino’s finding that:

While it appears that in anticipation of a possible deadlock, the Respondent [unlawfully] stopped making payments [to the employees’ health plan] in order to facilitate a transition to the Blue Cross/Blue Shield plan [proposed by the employer], there is no evidence that the failure to make timely payments affected negotiations. Quite the contrary, the parties met with a Federal mediator in March 1995, the Union took time to analyze the Respondent’s new proposals in April 1995, and the negotiations reconvened at the Respondent’s urging in May 1995. . . . Having reached good-faith impasse on May 15, the employer was entitled to implement its health insurance proposal after that date, which it did.

330 NLRB at 925-26.

prioritized Section 11 improvements and job security, regardless of how ALPA had handled the 2009 layoffs.

Significantly, Unit 1 never demanded that ALPA recall the laid-off employees as a condition to bargaining, or even as part of the bargaining. This indicates two things: 1) that this is not a case where the “baseline” for negotiations had moved in such a way that the union was simply attempting to “recoup” what it previously had; and 2) that Unit 1's concern in the contract negotiations was not with ALPA's January-February actions, but rather with the terms that would govern employees under the successor contract. *See J.D. Lunsford Plumbing*, 254 NLRB at 1366 (noting that “[t]he Union never demanded that the Company reinstitute the contract terms [that the employer had unilaterally changed] before bargaining could begin. The Union’s bargaining stance indicated that it was not concerned with the old contract terms, it was concerned with bringing the Company up to the Association’s standards.”).

Nor did any failure by ALPA to provide requested information cause the impasse. Wells testified that the names of individuals to be laid off was important “[s]o [Unit 1] could evaluate whether or not we could do anything through bargaining, with regard to those individuals.” Tr. 288:3-6. By the time that ALPA declared impasse on May 7, 2009, the names of the laid-off employees was long since public, and Unit 1 was free to fashion any proposal it wanted based on those names. And, with respect to the selection “criteria,” Unit 1 had all the information it needed in order to formulate proposals. As the Unit 1 witnesses recognized in their testimony, ALPA had told them that there were no objective criteria applied, but rather ALPA looked to soft factors such as the needs of the organization, and the individual's value relating to those needs, to arrive at a decision. Tr. 230:13-231:3. In short, it was ALPA's position that it had the discretion to decide which employee would be laid off, and it was Unit 1's position that ALPA should not

have that discretion. This is the exact same situation that ALPA and Unit 1 had been in many times before, most notably in the 1995-96 bargaining and the 2004 bargaining—in each of those rounds, ALPA had similarly stated that it needed the discretion to decide when to engage in layoffs, and whom to layoff, and Unit 1 had advocated for an objective criteria limiting that discretion. As in previous years, Unit 1 had all the information it needed in order to formulate a proposal restricting or conditioning that discretion, if it chose to do so. Indeed, that is precisely the approach that Unit 1 took, first proposing a seniority-based layoff restriction (as it had many times in the past), then proposing a no-layoff clause.

Given these facts, there is no basis to conclude that the General Counsel carried his burden of establishing a causal nexus between any unfair labor practice concerning the January-February layoffs, and the parties' inability to reach agreement in May.

2. Any Unfair Labor Practice Respecting Layoffs Did Not Cause the Impasse, because ALPA and Unit 1 Would Have Reached Impasse on Retiree Health Without Regard to the Layoffs

As shown above, any unfair labor practices respecting the layoffs occurred away from the table and did not contribute to the parties' inability to reach agreement. However, even if the record could be read to establish the required causal link between the two, the unfair labor practices still were not the cause of the deadlock, because the parties *still* would have failed to reach an agreement due to their utter deadlock concerning the retiree health program.

All witnesses at the hearing agreed on two things: first, that the retiree health plan changes sought by ALPA in the 2009 bargaining presented a difficult issue for the parties, and, second, that the parties were at loggerheads with respect to retiree health at all times, and all the way through to May 7, 2009. Retiree health issues are difficult in any context, but were extraordinarily so here. The plan had been a subject of concern for ALPA for at least five years;

the parties had negotiated extensively over retiree health during the 2004 bargaining, and had been unable to reach any agreement, other than to submit the question to a binding arbitration. ALPA and Unit 1 did arbitrate the issue, but the resolution was short-term, covering only the period of the existing contract. And, a problem that was bad to begin with became far worse with the collapse of the financial markets, which slashed the Plan's trust assets in half. Tr. 620:10-22; Tr. 149:8-12.

Any recounting of the 2009 bargaining, *supra* at Background Facts Parts II.A, C, amply demonstrates the intractability of the issue. Focusing on the final days of negotiations, the parties spent a majority of their time consumed with retiree health. Indeed, as of March 31, with respect to retiree health, the parties had yet to agree on any of the three areas of change sought by ALPA: eligibility changes, design changes (including increases in deductibles), and increases to premiums. *See* Tr. 432:20-433:6. In Johnson's view, the parties "had no momentum and . . . were pretty deadlocked on these three [retiree health] issues." Tr. 433:7-14.

Moreover, when the parties met again with the mediator on April 14, the day's discussions were consumed with retiree health issues. *See* Exh R15 at ALPA 12373; GC Exh. 43. Unit 1 also requested information via the mediator, all of which related to the financials of the retiree health plan—not to the layoffs that had occurred months prior. GC Exh. 5, 4/14/2009 at 1.

On April 16, ALPA tendered its last best and final offer to Unit 1. After ALPA's four elected National Officers spoke, the parties met through the night and into early the next morning. R. Exh. 15 at 12374-76; Tr. 166:16-167:25. These negotiations focused largely on the retiree health plan. R. Exh. 15 at ALPA 12376-77. ALPA and Unit 1 were still in complete disagreement over ALPA's proposal to change the retiree health plan, with Wayne Klocke stating

that it was “crystal clear” that ALPA “can’t move the [eligibility] goal posts [with]out [Unit 1’s] consent,” and adding that “nothing in the Plan can be [changed] w/out [Unit 1’s] consent,” including premiums, deductibles, and copays. R15 at 12376-77. ALPA concluded that the two were now “farther apart [rather] than closer” and indicated to Unit 1 that it believed it would have to implement the last best and final offer. *Id.* at 12377. ALPA nevertheless continued to meet with the FMCS mediator and Unit 1, attempting to reach agreement. Unit 1 provided its counter-offer to ALPA’s last, best and final offer on April 30, 2009. R. Exh. 34 at 1. In this counter-offer, Unit 1 did not meet ALPA on any of the three areas of disagreement remaining at the time of the last, best and final offer.

Retiree health proved particularly intractable.<sup>37</sup> The last words recorded by Unit 1’s note-taker for the April 30 session is Collie stating that ALPA “just needed more on Retiree.” GC Exh. 43 4/30/09 at 3. Collie estimated that sixty to sixty-five percent of the bargaining time was spent on retiree health negotiations. Tr. 621:14-18. ALPA provided Unit 1 with extensive documentation relating to the plan, including information regarding investment decisions and

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<sup>37</sup> There were other difficult issues on which the parties spent a good deal of time and were ultimately able to reach tentative agreement. For instance, ALPA was seeking to implement, for the first time, health care premium contributions for active employees, which was “a threshold [Unit 1 was] not willing to cross[.]” Tr. 622:24-623:5. As late as March 29, Unit 1’s President explained Unit 1’s staunch opposition to this effort in a letter to Jalmer Johnson and all ALPA’s National Officers and Executive Council, stating “once the line against sharing premiums is breached, it is highly unlikely that we will ever be able to remove this odious concession from future contracts.” GC Exh. 55 at 2. After substantial effort between the parties, including various proposals and information exchanged, they eventually came to a general agreement that, in place of a premium contribution, employees could individually elect between an HMO or a wage reduction in order to maintain participation in the PPO. Tr. 623:9-624:3. On March 31, Unit 1 proposed a 1% optional pay cut for those employees that wished to maintain a PPO plan, and contingent on various conditions. ALPA accepted this model on April 15, initially proposing a 2% cut, then proposed a 1.6% cut in its last best and final offer. Unit 1 accepted this level of wage reduction, but objected to language allowing Unit employees to opt for the management plan, and so the parties never reached tentative agreement on this provision. *See* R. Exh. 34 at 3, 13-14, 33-34, 48, 61.

fiduciary management of the trust, audit and financial statements dating back to at least the 1990s, and FAS calculations for the Plan. Tr. 621:19-622:20; 149. Despite all this, ALPA and Unit 1 remained fiercely at odds on all three plan issues: eligibility, premiums and plan design. As for premiums, ALPA's last best and final offer had proposed a premium tied to the cost of the plan, and which ranged between 12% and 27.6% of plan costs, depending on the individual's salary and age at retirement. *See* GC Exh. 34 at UALPAPAE 002098. In Unit 1's April 30 response, Unit 1 proposed a fixed rate premium (ranging from a low of \$33.13 per month to \$189.85 per month, based on salary at retirement), meaning that the risk of increased health care costs would rest solely on ALPA's shoulders, a risk ALPA was no longer able to carry. *See* GC Exh. 40 at UALPAPAE 002129. As to eligibility, ALPA's last best and final offer required new hires to have 25 years of service and reach age 65 in order to qualify for retiree health benefits, employees with five years seniority to meet a 56/18 rule and other current employees to meet a 62/20 rule. Unit 1, in contrast, sought a 60/20 eligibility rule for new hires, and a 56/18 rule for all current employees.

Not only is there evidence that the parties remained far apart on retiree health from beginning to end, there is also nothing in the record that implies that Unit 1 would have acceded to ALPA's retiree health proposal to resolve the outstanding disagreement on job security. To the contrary, the record shows that the parties were simply staring across a philosophical gulf, with Unit 1 maintaining that the financial shortfall and the risk of increasing premiums were ALPA's responsibility to bear, and that neither was inclined to blink. That gulf was deep-seated and long-standing, and predated by years anything ALPA did or failed to do with respect to the January-February layoffs.

In contrast to the extended and difficult negotiations over retiree health, there were no negotiations, or requests for information, related to the job security or layoff issue between February 11 and March 27, at which point Unit 1 made a comprehensive proposal including a no-layoff clause. Again, there was virtually no discussion of job security over the next three days of bargaining, until late on March 31, when Unit 1 revised its position to link the no-layoff clause to ALPA revenue. ALPA accepted this model in its next counter, made the following day, although the parties were not able to agree on the precise staffing floor and revenue triggers. Comparing this to the time and effort spent on the retiree health problem, particularly during the final days of negotiation, it is evident that retiree health was the greater sticking point.

In its totality, the evidence at the hearing established that there was no causal connection between any actions taken by ALPA with respect to the January-February 2009 layoffs and the failure to reach an agreement, as the parties would have been unable to reach agreement due to the wide gulf between them on the retiree health program. *Cf. J.D. Lunsford Plumbing*, 254 NLRB at 1366. “In light of the parties' bargaining history, their good-faith negotiations over a protracted time period, the critical nature of the issues that remained unresolved when [ALPA] declared impasse, and the inability of a Federal mediator to facilitate agreement,” the parties had reached a lawful impasse, “notwithstanding [any] unfair labor practices.” *Washoe Medical Center*, 348 NLRB at 362.

**V. ALPA HAD NO OBLIGATION TO PROVIDE UNIT 1 EMPLOYEES WITH MERIT WAGE INCREASES AFTER THE CONTRACT WITH UNIT 1 EXPIRED ON MARCH 31, 2009**

The compensation section of the Agreement between the ALPA and Unit 1, Section 16, has for many years included a Section A, entitled “Across the Board Increases” and a Section B, entitled “Salary Increases.” Historically, the merit-based “Salary Increases” pre-dated the

“Across the Board increases,” and, for most employees, significantly outstripped the “Across the Board Increases.”<sup>38</sup> The undisputed record shows, however, that both sorts of increases were treated as annual components of compensation, expiring at the end of each contract year. For example, in the most recent CBA, ALPA and Unit 1 negotiated that employees were entitled to merit pay increases of up to 4.5%, depending on performance appraisal rating, *during the contract year running from April 1, 2008 to March 31, 2009*. Following March 31, there was no rate to apply until the parties negotiated a new agreement. As a result, while ALPA continued to conduct performance appraisals, as provided for in Section 16 of the expired contract, ALPA ceased awarding merit pay increases because the ratings in those appraisals could not be translated into a concrete value unless and until the parties negotiated new percentage rates for merit increases. Instead, ALPA agreed with Unit 1 in its standstill agreement with Unit 1 that whatever rate the parties ultimately agreed upon would be applied *retroactively* to April 1, 2009.

The ALJ, with virtually no analysis, concluded that ALPA violated Section 8(a)(5) of the Act by failing to “negotiate with Unit 1 before it ceased making merit pay distributions to eligible employees.” ALJD 11:3-4. As we now show, the ALJ’s finding is due to be rejected because it ignores the record evidence and the applicable Board precedent that the ALJ himself cites. Moreover, if adopted, it would fundamentally alter the collective bargaining process and the incentives to reach agreement. For that reason, the ALJ decision must be rejected.

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<sup>38</sup> See R. Exh. 18 at ALPA 18-19 (1979-1980 Agreement; merit increase, but no provision for an ATB increase); R. Exh. 19 at ALPA 48, 51-53 (1981-1983 Agreement; merit increases up to 11%, increasing to 12% in second year of contract, compared with 6% ATB); R. Exh. 11 at ALPA 86, 89 (1983-1986 Agreement; merit increase up to 7%, increasing to 8% in final year of contract, compared with ATB of 4% or 5%); R. Exh. 20 at ALPA 167, 170 (1987 Agreement; merit increase up to 4%, compared with ATB of 2%); R. Exh. 4 at ALPA 216-17 (1988-1991 Agreement, 2% ATB compared with merit increases up to 7%); R. Exh. 8 at ALPA 292-293 (1992-1995 Agreement; merit increases up to 7%, compared with 2% ATB); R. Exh. 10 at ALPA 372-73 (1996-1999 Agreement; merit increases up to 6%, compared with 2% ATB); R. Exh. 13 at ALPA 476-77 (2000-2004 Agreement; merit increases up to 6%, compared with 2% ATB).

## **A. The Legal Framework**

It is well-established that following expiration an employer may not change the terms and conditions of employment without reaching agreement, or bargaining to good faith impasse, with the union. The rule is a two-way street, meaning that an employer may no more *increase* benefits to its employees than it may *decrease* those benefits. Accordingly, the Board has often found violations of Section 8(a)(5) of the Act where an employer unilaterally grants a post-expiration wage increase or bonus to represented employees. *E.g.*, *NLRB v. Katz*, 369 U.S. 736 (1962); *Ironton Publications, Inc.*, 321 NLRB 1048, 1048 (1996). And, the Board has held that, even at impasse, an employer may not provide a wage increase higher than what was previously offered by the employer in negotiations. *NLRB v. Crompton-Highland Mills*, 337 US 217, 223-225 (1949); *Falcon Tank Corp.*, 194 NLRB 333 (1971).

With respect to an employer's obligation when negotiating for a first contract, the Board has explained the tension as follows:

An employer with a past history of a merit increase program neither may discontinue that program . . . nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. . . . What is required is a maintenance of preexisting practices, *i.e.*, the general outline of the program, however, the implementation of that program (to the extent that discretion has existed in determining the amount or timing of the increases) becomes a matter as to which the bargaining agent is entitled to be consulted.

*Oneita Knitting Mills*, 205 NLRB 500, 501 n.1 (1973). More recently, the Board considered in *Daily News of Los Angeles* 315 NLRB 1236 (1994), when, and to what degree, a merit pay program that has some discretionary aspects constitutes a term and condition of employment that must be continued absent agreement or impasse. In *Daily News*, the Board stressed that the question is whether the employer continues its “preexisting system,” not whether any particular merit pay rate is paid. *Id.* at 1240.

**B. The Bargaining History Between ALPA and Unit 1 Concerning Merit-Based Pay Increases**

In this case, the evidence establishes that, in ALPA's bargaining history with Unit 1, annual wage increases had two components: a small across-the-board increase, and a potentially much larger increase that varied based on performance appraisals. Both rates (the across-the-board rates and the merit rates) were the result of negotiations between Unit 1 and ALPA.<sup>39</sup> Over the course of the parties' relationship, the merit increase percentages varied substantially and were always applied to a *defined contract year*.

1. Language and History Relating to Application of Merit Pay Increases: 1992-2008 Agreements Specify that Across-the-Board Increases are to be Paid "In Addition to Any Merit Increase a Staff Employee Would be Eligible For" in That Contract Year

The historical development of the language conclusively demonstrates this point. For example, in 1992, the Compensation Section of the agreement provided that: "Effective January 1, 1992,<sup>[40]</sup> the salary level of each Staff Employee will be increased by 2% based upon the Staff Employee's salary as of 12/31/91, notwithstanding the maximum salary ranges in effect at that time. This increase shall be in addition to any merit increase a Staff Employee would be eligible for *in 1992*." R. Exh. 8 at ALPA 292-293 (1992-1995 CBA), at Section 16 (emphasis added). The three following paragraphs address, in identical terms, each succeeding year of the agreement, unequivocally describing the merit increase component of compensation as particular to a *particular contract year*.

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<sup>39</sup> The fact that percentage increases were negotiated as opposed to discretionary is significant and distinguishes the instant case from the decisions relied upon by the ALJ.

<sup>40</sup> At this time, the expiration date of the parties' agreements was December 31. In the parties' 2004-2008 agreement, expiration shifted to March 31.

This pattern continued in the parties' subsequent agreement, which ran for another four-year period. Again, Section 16 included a separate paragraph for each of the annual "across-the-board" increases and specified that these annual increases were intended to be "in addition to any merit increase a Staff Employee would be eligible for" *in that year*. R. Exh. 10 at ALPA 372 (1996-1999 CBA), at Section 16.A; R. Exh. 13 at ALPA 476 (2000-2004 CBA), at Section 16.A.<sup>41</sup>; R. Exh. 14 at ALPA 597 (2004-2008 CBA), at Section 16.A.

In their 2004-2008 agreement, the parties eliminated the across-the-board wage increase in favor of the possibility of a bonus tied to revenue, but maintained the merit pay component of compensation. Tr. 497:13-499:5. Despite the lack of any guaranteed across-the-board increases, the parties nevertheless retained in their agreement the *concept* of such increases, and used precisely the same language as they had always used before to describe the interaction between across-the-board and merit increases: "This across-the-board increase shall be in addition to any merit increase a Staff Employee would be eligible for *in that year*." R. Exh. 14 at ALPA 597 (2004-2008 CBA), at Section 16.A. This language makes plain that, even when funding for across-the-board increases was unavailable, the parties' negotiated merit increases remained as a component of compensation payable in a *specific contract year*.

Further, although the parties retained the merit increase component in the 2004-2008, the percentages (unlike those in prior years) varied from year to year. To efficiently express those percentages, the parties for the first time created a chart. Each contract year is identified with its own column, and each possible rating (from "marginal" to "outstanding") is identified in a

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<sup>41</sup> The only change was that rather than providing each contract year with its own paragraph, the parties consolidated their discussion of the across-the-board increases into a single paragraph. It appears that they took this step because, unlike in prior contracts, the amount of the across-the-board percentage increase was the same (2%) in each contract year. R. Exh. 13 at ALPA 476.

separate row. The intersection shows *in that year* the percentage increase to which any Unit 1 employee receiving a particular rating is entitled. That each column was in fact intended by the parties to represent merit increases payable during a single, specific contract year is beyond question: Unit 1's own summary of the 2004 negotiations confirms the point, in describing the proposed tentative agreement as follows:

- No merit increases in year 1.
- Merit in year 2 – 3% Outstanding
- Merit in year 3 – 4% Outstanding
- Merit in year 4 – 4.5% Outstanding

R. Exh. 39 at 6.

2. 2008-2009 Agreement: The Parties Maintain Language Specifying that Merit Pay Increases are Payable During the Contract "Year"

In their 2008-09 agreement, the agreement whose language controls resolution of this issue, the parties continued to specify, using exactly the same words, that merit increases were payable "in that [contract] year." R. Exh. 1 at 76. Further, that the application of this percentage, like every other merit increase negotiated before it, was indeed intended to be confined *to the specific contract year* is again confirmed by Unit 1's own contemporaneous representations. John Schleder, the Chair of the Unit 1 bargaining committee, sent a summary chart of the tentative agreement to Kelly Collie on March 9, 2008, the day after ALPA and Unit 1 reached a tentative agreement. R. Exh. 26; Tr. 568:9-23, 570:3-16. In this summary, Schleder described the merit pay agreement as follows: "4-1-07 Merit rates *to apply for 4-1-08 to 3-31-09.*" R. Exh. 26 at 3 (emphasis added). The document accurately reflected Collie's

understanding of what the parties had agreed to: “[t]hat the merit rates that were effective 4/1/07 would be applied from 4/1/08 to 3/31/09.” Tr. 571:4-12.<sup>42</sup>

C. **ALPA Did Not Unlawfully “Discontinue” Payment of Merit Increases; Rather, the Last Negotiated Increase Was to be Applied in the Contract Year 2008-2009, and Thus No Wage Increase Was Due Following Expiration**

What emerges from these facts is that ALPA and Unit 1 shared a mutual understanding that the merit pay rate is an annual rate, applied to a defined contract year. This fact proves fatal to the ALJ’s decision. Significantly, in the public sector, public employee relations boards have analyzed the extent to which wage increases contained in an expired collective bargaining agreement survive expiration. Those cases make clear that where, as here, the agreement sets forth those wage increases in a “salary grid,” which is “limited to the . . . years covered by the contract,” the employer is not required to pay those increases after expiration. *See Suffolk County*, 18 Pub. Employment Rel. Bd. (Lab. Rel. Press) ¶ 3030 (N.Y. Pub. Employment Rel. Bd. Apr. 30, 1985). As the New York PERB stated further, the use of a salary grid “constitutes an express and explicit” intent of the parties that the wage increases do not survive expiration. *See id.* Similarly, in *Waterford Teachers Assn.*, 27 Pub. Employment Rel. Bd. ¶ 4540 (Lab. Rel. Press) (N.Y. Pub. Employment Rel. Bd. Apr. 11, 1994), the employer also denied step increases to teachers following the expiration of the collective bargaining agreement. Of particular significance is that the agreement in *Waterford Teachers*, setting forth a salary schedule for the “period September 1, 1989 to August 31, 1992”—that is, the three-year period of the agreement.

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<sup>42</sup> Eric Iverson, a member of the Unit 1 negotiating team, thereafter drafted a red-lined version of the Agreement, in which he added another column to the chart contained in Section 16.B.3 of the Agreement to show the rates for the contract year beginning April 1, 2008. Tr. 237:14-17; Tr. 237:25-239:2; R. Exh. 1 at 79. Obviously, there would be no need for Schleder to specify the parties’ agreement as to the merit increase ceiling, and no need for Iverson to add a separate column, if, as the General Counsel and Unit 1 contend here, the prior rates simply were understood to continue in force absent agreement by the parties.

*See id.* The PERB found that the reference to “the three years of the agreement” was a reference to a “finite period of time.” Accordingly, the PERB concluded that the increases specified in the agreement are limited to the “contractual term of September 1, 1989 – August 31, 1992, and that the District did not violate its obligation when in the school year 1992-1993 it maintained the same salaries that had been provided for in the school year 1991-1992.” *See id.*; *see also id.* (“Article V does not establish some mechanical salary structure which allows for predictable movement. Rather, it directs that each annual salary schedule was to be calculated using certain new, external and variable factors; then, without reference to the preceding schedule, it was to replace that schedule for a specific year only.”). The same result is compelled here.

Significantly, the parties’ mutual understanding that the specific merit-based pay percentage increases set forth in the CBA referred only to a defined, contract year is confirmed by the fact that, in previous years in which negotiations had run past contract expiration date, no merit pay increases were processed during the “lag time” before agreement. ALPA did not pay – as the ALJ is now suggesting – the merit pay percentage in the expired CBA. Instead, ALPA set the performance appraisals aside and did not process any merit pay increases until an agreement was reached to determine the merit pay increase rate. Tr. 506:3-14; 508:13-509:2. For example, the 1992-1995 Agreement expired on December 31, 1995, but the parties were unable to reach agreement and entered into an extension agreement. R. Exh. 27; R. Exh. 8. During the period of the extension, ALPA performed employee reviews, *see* Tr. 576:19-577:9, 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. R. Exh. 29; Tr. 581:23-582:13; Tr. 502:7-14.

The same process was followed by ALPA and Unit 1 following the expiration of the 2000-04 Agreement. ALPA again did not process any merit pay increases until the parties reached agreement on the successor contract. Employees whose anniversary occurred after expiration of the 2000-04 Agreement but before there was an agreement on the 2004-08 Agreement received a zero percent merit pay increase (the amount negotiated in the 2004-08 Agreement), as opposed to the 6% increase in the prior Agreement. Notably, Unit 1 never argued that ALPA acted improperly either in violation of the Agreement or Section 8(a)(5) of the Act.

Therefore, for those employees whose anniversaries occurred between expiration of an agreement and negotiation of a new one, they received the merit pay increase set forth in the new agreement.<sup>43</sup>

Because, as of April 1, 2009, no rates had been agreed to in negotiations, there were no rates to be applied.<sup>44</sup> ALPA continued to conduct performance appraisals, as provided for in Section 16 of the expired contract, but the ratings in those appraisals could not be translated into a concrete value unless and until the parties set the new percentage rates for merit increases for the 2009-2010 contract year. Indeed, had ALPA granted merit increases after April 1, it would have run afoul of *Ironton Publications* and the *Crompton-Highland Mills* line of cases—particularly since the best that ALPA had offered in negotiations was a 0% merit increase (*i.e.*, a

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<sup>43</sup> It also bears noting that, for a seven-week period following contract expiration in 2009, Unit 1 never raised a question about the fact that no employee had received a merit pay increase—despite the fact that, under the theory now espoused by Unit 1, Unit 1's own President would have been entitled to an increase effective April 1.

<sup>44</sup> This fact distinguishes the instant case from those cases where the Board has found a preexisting obligation that must be continued. *See, e.g., Covanta Energy Corp. & Covanta SEMASS LLC*, 356 NLRB No. 98, 15 (Feb. 25, 2011) (affirming ALJ finding of unfair labor practice for unilaterally halting that wage increases and bonus program occurring every year, at same time of year, for a standardized amount or based on objective criteria, and under terms communicated to employees earlier in the year).

wage freeze) and, as of March 29, Unit 1 had tentatively agreed to the two-year pay freeze with a revenue sharing component, GC Exh. 43, 3/29/09 at 1. Granting an increase would have constituted a unilateral change; maintaining wages at their existing levels did not constitute a change.

In *Daily News of Los Angeles*, the Board engaged in an extensive review of Board cases finding violations of the Act due to discontinuation of a previous merit pay program; in each case, the employer had unilaterally discontinued the program, without consulting with the union. See 315 NLRB at 1238. Here, in contrast, ALPA was actively negotiating with the Union over all terms and conditions of employment, and seeking to obtain agreement with the Union over all aspects of compensation including merit pay increases, during the time in question.

This fact is dispositive. In no way had ALPA announced that it would give no merit increases to those employees with anniversary dates after April 1, 2009. Nor did ALPA announce that it was somehow discontinuing the program. In fact, ALPA was at all times actively seeking to negotiate a consensual agreement respecting merit pay for these employees, as well as all other terms and conditions for the Unit 1-represented employees. As the stand-still agreements explicitly stated, ALPA agreed that whatever rate the parties agreed upon would be applied *retroactively* to April 1, 2009.<sup>45</sup> The General Counsel and Charging Party have not identified *any* other aspect of the contract *other than wages* that even *could* logically be applied “retroactively” – certainly not health benefit elections, retiree health, or job security.<sup>46</sup>

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<sup>45</sup> Had ALPA unilaterally applied the expired rate to those employees whose reviews had come due after April 1, 2009, it would then have been required to go back and retroactively adjust those increases *downward*, requiring ALPA to recoup unwarranted increases from those employees unlucky enough to have anniversary dates in the weeks after contract expiration. Unit 1 can hardly claim with a straight face that it expected such an absurd result.

<sup>46</sup> The ALJ’s decision gave great weight to the fact that ALPA continued all other terms and conditions of employment, including the dues check off, after March 31. See ALJD 10:28-32.

Unlike the merit pay cases discussed in *Daily News* and other first contract situations, ALPA's merit pay system was neither automatic nor discretionary. Rather, the rates that had been previously applied were specifically negotiated with the union to cover a specific, discrete contract year. As a result, there was no “practice” ALPA could continue on its own: the “practice” was to negotiate the rates with Unit 1, and to apply those rates retroactively. The ALJ’s decision, were it to be accepted, would establish a novel and unworkable principle: that negotiated annual wage increases are a term and condition of employment that survive the expiration of the contract. If such were the rule, and represented employees could continue to receive previously-negotiated wage increases each year, one of the primary incentives for a union to settle a contract would disappear, and employers in a recessionary climate would hasten to declare impasse. Such a result is contrary to the Act’s goal of encouraging mutual agreement on terms and conditions of employment.

**D. In the Alternative, ALPA Was Permitted to Change the Merit Pay Program Under the Stone Container Doctrine Because the Increases Were Discrete Recurring Events that Came Due During the Course of Bargaining**

Even if it were determined that ALPA did make a change to existing terms and conditions of employment, the Board has held that an employer “may lawfully implement a change in that term or condition [of employment] if it provides the union with reasonable advance notice and an opportunity to bargain about the intended change in past practice.” *Neighborhood House Assn.*, 347 NLRB 553, 554 (2006) (citing *TXU Electric*, 343 NLRB 1404 (2004); *Stone Container*, 313 NLRB 336 (1993); *Alltel Kentucky*, 326 NLRB 1350, 1350 n.4 (1998)).

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This argument misses badly because it ignores, as set forth above, the unique nature of merit pay, which is negotiated to cover a specific, discrete contract year. Moreover, although ALPA was entitled to discontinue dues checkoff following contract expiration, see *Hacienda Resort Hotel & Casino*, 331 NLRB 665 *vacated*, *Local Joint Exec. Bd. Of Las Vegas v. NLRB*, 309 F.3d 578 (9th Cir. 2002), the fact that it continued to allow this courtesy to the union should not be held against it.

The ALJ erroneously found that this doctrine did not apply because ALPA purportedly failed to provide “advance notice that employees who were scheduled for merit pay increases after March 31 would not receive them due to the expiration of the parties’ contract on that date.” ALJD 11:34-36. This finding is belied by the record, which shows that the parties had been bargaining over the compensation package since at least February 12, 2009. GC. Exh. 12. In fact, from February 12, 2009 onward, ALPA had consistently maintained its position that it needed to achieve a wage freeze going forward, including zero percent increases for all performance appraisal levels. GC. Exhs. 12, 14, 17, 20, 21, 24, 26, 33, 34, 68

The ALJD’s finding that these negotiations do not constitute notice and an opportunity to bargain is unfounded in law. *Alltel Kentucky, Inc.*, 326 NLRB 1350 (1998) is dispositive on this point. In that case, the employer had proposed a wage freeze during bargaining, but negotiations had reached a deadlock on this issue, among others. The Board affirmed the ALJ’s finding that the employer’s bargaining proposal that it pay nothing for its annual wage increase the next year constituted notice and an opportunity to bargain over the change. *Id.* at 1350. *Alltel*, properly considered, compels the conclusion that ALPA and Unit 1’s negotiations – which included reaching tentative agreement – regarding merit pay meet the requirements of notice and an opportunity to bargain under *Stone Container*. Therefore, even if not granting additional merit raises after April 1, 2009 constituted a “change” in terms, ALPA did not violate the Act.

## **VI. REMEDY**

As set forth above, ALPA has shown that the ALJ’s finding that ALPA committed any unfair labor practices is wrong as a matter of law. Additionally, the ALJ’s order regarding remedy is also due to be reversed. In particular, the ALJ concluded that ALPA should “be ordered to make whole employees and former employees for any loss of wages or other benefits

they suffered as a result of the Respondent's implementation of its final April 16, 2009 contract offer on May 7, 2009, including its unilateral discontinuance of bargaining unit merit pay increases on or about April 1, 2009." ALJD 17:16-20. As we now show, the order of a make whole remedy for the purported ULP concerning the merit pay increases is in error. Instead, because the scope of any merit-based pay increase for a specific contract year has been determined exclusively through negotiations between the parties, the proper remedy here for any ULP regarding the merit-based pay increase is a bargaining order.

As set forth in detail above at Part V, in each CBA, ALPA and Unit 1 negotiated a particular wage increase (both a small across-the-board increase and a larger increase that varied based on performance appraisals) that was particular to a defined contract year. For example, in the parties' 1992-95 CBA, ALPA and Unit 1 stated that the across-the-board increase "shall be in addition to any merit increase a Staff Employee would be eligible for *in 1992*." R. Exh. 8 at ALPA 292-93 (1992-95 CBA), at Section 16 (emphasis added). That pattern continued in the parties' successive agreements. *See* R. Exh. 10 at ALPA 372 (1996-1999 CBA), at Section 16.A; R. Exh. 13 at ALPA 476 (2000-2004 CBA), at Section 16.A;<sup>47</sup> R. Exh. 14 at ALPA 597 (2004-2008 CBA), at Section 16.A.

Not only did the parties agree to language in each CBA making clear that the merit-based pay increase applied to a specific contract year, but the history of negotiations between the parties further confirms that the amount of any percentage increase varied from contract to contract. Moreover, in the 2004-2008 CBA, the amount of the increase varied from *year-to-year*

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<sup>47</sup> The only change was that rather than providing each contract year with its own paragraph, the parties consolidated their discussion of the across-the-board increases into a single paragraph. It appears that they took this step because, unlike in prior contracts, the amount of the across-the-board percentage increase was the same (2%) in each contract year. R. Exh. 13 at ALPA 476.

within that agreement, ranging from a zero percent increase in year 1, to 3% in year 2, 4% in year 3, and 4.5% in year 4. R. Exh. 39 at 6.

In short, there is no formula by which the merit-based pay increases are calculated. Instead, they vary and are determined solely through the collective bargaining process. For that reason, the determination by the NLRB of any make whole remedy—that is, the percentage of any merit-based pay increase—would be speculative: should it be zero percent? 4.5%? 3%? Something else? Given that there is no principled basis on which to choose one figure over another, the circumstances here require that the parties return to the bargaining table to determine it. In similar situations, where the amount of the increase cannot be reliably be established, the Board has previously found that the proper remedy is a bargaining order. Thus, in *Coronet Industries, Inc.*, Case No. 12-CA-22715, 2003 WL 22114706 (NLRB Div. of Judges Sep. 5, 2003), an employer was found to have unilaterally failed and refused to pay a Christmas bonus and to grant an annual wage increase to its employees. The Administrative Law Judge issued a bargaining order, explaining that:

The facts of this case make a precise determination of the amount of the bonus and wage increase that would have been granted absent the unfair labor practice somewhat difficult. Although the record established that the Respondent paid a Christmas bonus and increased its employees' wages every year at about the same time until the Union was certified, the amount of the bonus and the size of the increase varied depending on the Respondent's financial condition. . . .

Because the Respondent unlawfully failed and refused to afford the Union adequate notice and an opportunity to bargain about its decision not to grant these benefits this year, *one can only speculate as to the amount* that would have been granted had the Respondent complied with its obligations under the Act. Rather than arbitrarily fix an amount for the bonus and wage increase, I recommended in my bench decision that the Respondent be ordered to bargain with the Union, in good faith, as to the amount of the bonus and wage increase and to implement whatever amount was agreed to retroactive to December 20 for the bonus and January 1, 2003 for the wage increase. This is what the Act required the Respondent to do in the first place. If the parties are unable to reach an agreement after good faith bargaining, then the Respondent would be free to implement its final offer to the Union.

*See id.* (emphasis added). Stated differently, the Judge ordered that the employer bargain with the union to determine what the wage increase should be, because that is “what the Act required the Respondent to do in the first place.” *See id.*; *see also Transmarine Navigation Corp.*, 170 NLRB 389 (1968) (issuing bargaining order where an award of any particular amount would be speculative).<sup>48</sup>

Because, in the instant case, the amount of any merit-based pay increase varied from contract to contract and, most recently, year to year, the remedial approach of in *Coronet* and *Transmarine* are applicable here. Accordingly, the ALJ’s finding that a make whole remedy is appropriate should be reversed.<sup>49</sup>

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<sup>48</sup> These cases stand in stark contrast to cases in which a determination can reliably be determined based on the history of its implementation. For example, in *Burrows Paper*, 332 NLRB 82, 84 (2000), the employer had paid the *same three percent increase* “for the past 25 years.” It was only because of the certainty of what the increase would have been that permitted the Board to require the payment of a three percent increase. *See id.*

<sup>49</sup> The ALJ’s decision does not specify any particular amount that ALPA should be required to pay as part of the make whole remedy. While ALPA will present arguments in the compliance proceeding, should that become necessary, we note here that, to the extent that the ALJ intended ALPA to continue to pay the 4.5% increase in the final year of the expiring CBA, that decision must be reversed. Not only would such a finding be speculative, for the reasons set forth above, but it would ignore what ALPA and Unit 1 in fact tentatively agreed to during negotiations—namely, a zero percent increase for merit-based pay for 2009-2010, and again for 2010-2011. *Compare* GC Exh. 20, 21 (ALPA proposal wage freeze and revenue sharing) *with* GC Exh. 22 (Unit 1 acceptance of wage freeze and revenue sharing).

**CONCLUSION**

For the reasons stated, the ALJD erred in its findings against ALPA, and the Complaint should be dismissed in its entirety.

Respectfully submitted,

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Dated: May 16, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 16<sup>th</sup> day of May, 2011 served a copy of this Brief in  
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