

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL

and

Cases 05-CA-34837
(formerly 18-CA-18999)
05-CA-35014
05-CA-35244
05-CA-35419

UNION OF ALPA PROFESSIONAL AND
ADMINISTRATIVE EMPLOYEES, UNIT 1

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
CROSS-EXCEPTIONS
AND
BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

Pursuant to Section 102.46(e) of the Board's Rules and Regulations, the Acting General Counsel files the following cross-exceptions to the decision of Administrative Law Judge Bruce

D. Rosenstein:

I. STATEMENT OF THE CASE

Upon charges filed by Union of ALPA Professional and Administrative Employees, Unit 1 (Unit 1), on July 5, 2010, the Regional Director of Region 5 issued a Second Amended

Consolidated Complaint alleging that Respondent Air Line Pilots Association, International (ALPA or Respondent) violated Section 8(a)(1) and (5) of the Act. The case was tried before ALJ Bruce D. Rosenstein on November 2, 8-10, 12, and 15, 2010 in Washington, D.C. On February 15, 2011, Judge Rosenstein issued his decision finding that ALPA had committed the violations alleged in the Complaint, and recommended an order requiring ALPA to remedy the effects of its unlawful conduct.

Specifically, the judge found that Respondent violated Section 8(a)(1) and (5) of the Act by: (1) failing to bargain with Unit 1 over the decision to abolish jobs/lay off employees on January 8 and 9, February 19, 26, 2009, and January 29, 2010, and the effects of that decision; (2) delaying in or failing and refusing to provide Unit 1 with information related to those layoffs; (3) unilaterally changing employees' terms and conditions of employment, including merit pay provisions without having reached agreement with Unit 1; and (4) declaring that the parties were at impasse and unilaterally implementing its final contract offer, without the parties having reached a lawful, good-faith impasse.

On May 16, 2011, Respondent filed Exceptions and a Brief in Support of Exceptions to Judge Rosenstein's decision and recommended order.

II. FACTS

The Acting General Counsel incorporates by reference the statement of facts from the Answering Brief to Respondent's Exceptions (GC Answering Brief, p. 2-43)

III. CROSS-EXCEPTIONS

The Acting General Counsel excepts to the following findings and conclusions of the Administrative Law Judge:

Exception #1: The ALJ's failure to find that on or about January 6, 2009, Unit 1 negotiators made an oral request to bargain over any decision to abolish positions in Minneapolis, and anywhere else before a decision was made. (ALJD 6:32-35)

Argument

The judge's decision states that "Unit 1 made an oral request to bargain over any decision to abolish employee positions in Minneapolis." However, the uncontroverted testimony of Unit 1's negotiators shows that Unit 1 did not limit its bargaining demand to Minneapolis. Unit 1 negotiator Eric Iverson testified, "...so Russ [Woody] jumped in right then and said, 'We want to talk about what is going to happen in Minneapolis and wherever else before the decision is made,' and I underline 'before' because he was very emphatic about that word." (Tr. 192:24-193:3; GCx 43, Jan. 6, p.7) Similarly, Unit 1 negotiator Wayne Klocke testified that Unit 1's bargaining demand on January 6, 2009, was not limited to Minneapolis: "And it was not limited to Minneapolis in any sense. We had been discussing Minneapolis. But we said clearly and unequivocally we want to bargain on all reductions in force." (Tr. 85:21-24)

Therefore, the judge's findings should be amended to more accurately reflect Unit 1's demand to bargain about all employee layoffs.

Exception #2: The ALJ's failure to find that ALPA's layoff of Unit 1 employees in 2008 was a *fait accompli*.

Argument

The Acting General Counsel has argued that any asserted past practice of layoffs did not amount to a waiver of Unit 1's right to demand bargaining over layoffs in 2009 and 2010, under the standard set forth in *Owens-Corning Fiberglas*, 282 NLRB 609 (1987). However, to any extent that the Board considers the 2008 layoffs to be relevant to ALPA's bargaining obligation in 2009 and 2010, the Acting General Counsel excepts to the judge's failure to find that those layoffs were a *fait accompli*.

In the spring of 2008, Jalmer Johnson and Kelly Collie generated a list of proposed staff cuts for ALPA's national officers' review. (Tr. 738:15-21) ALPA's national officers were presented with the list of proposed staff cuts on May 8, 2008, and approved the list. (Tr. 677-680) Jalmer Johnson testified that once the national officers approved the list, that decision was the final decision. (Tr. 363:5-8) Collie testified that if Unit 1 would have demanded to bargain over the layoffs, ALPA would have refused to bargain. Instead, ALPA would have only met and discussed the layoffs. (Tr. 705-706)

Where an employer presents a layoff as a *fait accompli*, the employer excuses any alleged failure of the union to demand bargaining over the layoff. *Toma Metals, Inc.* 342 NLRB 787, 788 (2004). The record shows that ALPA's officers made a "final decision" to conduct these layoffs before Unit 1 was informed, and even if Unit 1 had demanded bargaining, ALPA would have refused. Under these undisputed facts, the ALJ should have found that the 2008 layoffs were a *fait accompli*.

Exception #3: The ALJ's failure to find that Elaine Grittner's layoff on January 29, 2010, was a *fait accompli*.

Argument

The Acting General Counsel excepts to the ALJ's failure to find that Elaine Grittner's layoff was a *fait accompli* because the facts show that ALPA made the decision to lay off Grittner before informing Unit 1, and because ALPA announced that it would refuse to bargain over her layoff.

The facts show that by a letter dated November 6, 2009, ALPA announced to Unit 1 that Elaine Grittner's employment with ALPA "will end on Friday, January 29, 2010."¹ (GCx 44) At that time, Grittner was a benefits specialist employed in ALPA's Minneapolis office. In response to ALPA's letter, Unit 1 president Don McClure sent a letter to ALPA's Director of Human Resources Kelly Collie informing her that it was Unit 1's position that ALPA had an obligation to bargain over the decision to lay off Unit 1-represented employees, and the effects of any such decision. McClure then stated that Unit 1 wanted to bargain over the decision to lay off Grittner and the effects of that decision. (GCx 45)

By a letter dated November 13, 2009, Collie responded to McClure's demand to bargain. Collie stated that ALPA disagreed that it had an obligation to bargain over layoffs. She added that Grittner was being laid off under the terms and conditions of employment that ALPA imposed on May 7, 2009. She stated that under the terms of the imposed agreement, ALPA was willing to "meet with Unit 1 to discuss the RIF," and that ALPA "will consider any proposals for reallocation of work from non-Unit 1 personnel in order to avoid the RIF." (GCx 46)

¹ The evidence shows that at some point prior to informing Unit 1 of Grittner's layoff, ALPA had already informed Grittner that she was going to be laid off. (Tr. 219:13-23)

Unit 1 negotiators Wayne Klocke and Russ Woody responded with a letter to Collie dated November 22, 2009. In this letter, Unit 1 explained that ALPA was required to bargain in good faith over Grittner's layoff and its effects, rather than "discuss" her layoff. (GCx 47)

The parties' bargaining committees met on December 14 and 15, 2009, to talk about Grittner. (Tr. 218:14-17; 630:13-21) Consistent with the parties' earlier letters, Unit 1 negotiator Eric Iverson testified that Unit 1 came to the table to try to bargain about Grittner. (Tr. 218:21-219:3) Collie explained that the purpose of these meetings with Unit 1 was to discuss options or alternatives to conducting a job elimination; however, Collie was clear when she testified that ALPA was not meeting for the purpose of bargaining over Grittner. (Tr. 627:12-14; 669:4-670:1)

The record shows that during these meetings with ALPA, Unit 1 repeated that ALPA had an obligation to bargain about Grittner, and that the Union was going to try to frame a proposal. In response, ALPA representative Jim Johnson said that to be clear, ALPA was not bargaining; it was meeting and conferring. Woody confronted Jim Johnson, asking, "You're not bargaining?" And Jim Johnson replied, "No." When asked if ALPA was refusing to bargain, Jim Johnson replied that "We'll let another agency decide that." (Tr. 220:5-22)

During the parties' meeting on December 15, Jim Johnson asked Unit 1 what remedy it was seeking for Grittner. Woody replied that the situation was basically a fait accompli, and that made it difficult for Unit 1 to "place a marker." Iverson added that the Union tried to model a job for Grittner, but ALPA wasn't interested. (Tr. 228:8-15) Iverson testified that it was clear that ALPA had made a decision to terminate Grittner. (Tr. 259:11-15) The record does not show that ALPA ever submitted any proposals regarding Grittner, other than its proposal to lay her off.

Where an employer presents a layoff as a fait accompli, the employer excuses any alleged failure of the union to demand bargaining over the layoff. *Toma Metals, Inc.* 342 NLRB 787, 788

(2004); *Brannan Sand & Gravel Co.*, 314 NLRB 282, 282 (1994). Here, before meeting with Unit 1, ALPA personally informed Grittner that she was going to be laid off. Further, Collie admitted during her testimony that ALPA had already selected the day when Grittner would be “out the door.” (Tr. 670:2-4) Finally, the record shows that ALPA’s negotiators admitted that they were only willing to “discuss” Grittner’s layoff with Unit 1, but made it very clear that ALPA would *not* bargain. In sum, the evidence shows that ALPA did not enter discussions with Unit 1 with an open mind and a sincere desire to reach an agreement, but instead had made a final decision to lay off Grittner before providing Unit 1 any notice or opportunity to bargain.

Exception #4: The ALJ’s failure to find that ALPA had not met its burden to establish that the names or positions of employees subject to layoff are confidential.

Argument

ALPA has asserted at various times that it was privileged to withhold information about employee layoffs from Unit 1 because Unit 1 would not agree to keep this information confidential. It is well-established that when an employer objects to providing information which it asserts is confidential, it must (1) explain why the information is confidential, and (2) come forward with some offer to accommodate its concerns. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Ass’n of D.C. Liquor Wholesalers*, 300 NLRB 224, 229 (1990). It is the employer, not the General Counsel, that bears the burden of providing confidentiality, and it must prove its confidentiality interest is legitimate and substantial. The Board has held that blanket claims of confidentiality are insufficient to satisfy an employer’s Section 8(d) obligation to bargain in good faith. *Pennsylvania Power and Light Co.*, 301 NLRB at 1105. Here, ALPA has not met its

burden of proving that the withheld information was confidential, and the judge should have made this finding.

As an initial matter, ALPA only asserted that the *names* of the laid-off employees were confidential. ALPA never asserted to Unit 1 that the *positions* of the employees selected for layoff, or that the process by which employees were selected for layoff was confidential.

ALPA claims that the names of the employees selected for layoff are confidential because ALPA did not want the affected employees to find out they were being laid off before ALPA was ready to tell them. Jim Johnson explained that ALPA wanted to conduct the layoff “humanely,” and “someone sitting at their desk and they hear I’m being laid off, it’s not, in our view, the right way to do it.” (Tr. 427:25-428:7) By this statement, Johnson demonstrates how ALPA has arrogated to itself a judgment about the “right way” to inform employees that they are being laid off. In fact, ALPA has presented no justification for why it is somehow more “humane” for an employee sitting at his desk to learn from ALPA that he is being laid off, than to hear the same news from his union representatives, and it certainly hasn’t substantiated why this information is confidential.

Accordingly, the judge should have found that Respondent has not met its burden to show that this information was confidential, and therefore, it cannot rely on this defense for withholding the requested information from Unit 1.

Exception #5: The ALJ's finding that ALPA informed Unit 1 on February 24 that it intended to abolish an additional position in Houston, effective February 26. (ALJD 7:4-5).

Argument

The ALJ's finding is not supported by the record evidence. The record shows that on February 24, 2009, ALPA, by Kelly Collie, informed Unit 1 president Jay Wells that ALPA was going to layoff an employee, but Collie did not identify who this employee was or where he worked. The evidence shows that Unit 1 was not notified that Houston employee Jim Moody was laid off until after Moody himself was informed on February 26, 2009. (Tr. 106:14-25; 290:1-13) The important distinction between these facts, and those found by the judge is that the Board should not find that Unit 1 had any advance notice that ALPA was going to conduct layoffs in Houston, or that Jim Moody in particular was going to be laid off.

Exception #6: The ALJ's rejection of GC Exhibits 56, 57, 59, and 60. (Tr. 294-296; 299-302)

Argument

The ALJ rejected GC Exhibits 56, 57, 59, and 60 because he found that they were not relevant to the issues raised in the Complaint.

These exhibits demonstrate the context in which the standstill agreements were negotiated. ALPA claims that an essential element of the standstill agreements was the suspension of merit-pay increases, while the General Counsel's position is that the weight of the evidence shows that the standstill agreements were negotiated solely to prevent either party from taking economic action after March 31, 2009. To that end, these rejected exhibits provide evidence of the environment in which these standstill agreements were negotiated. They show

that there was a very real possibility of a strike, including the measures ALPA was taking on March 30 and 31 to prepare for a work stoppage. Therefore, these exhibits are relevant for evaluating and interpreting the meaning of the terms reached in the standstill agreements negotiated on and after March 31. Additionally, Exhibits 56 and 57 are relevant to show that as a result of ALPA's unfair labor practices, job security remained an important issue to the Unit 1 membership in the period preceding ALPA's unilateral implementation of its final offer. Under the liberal standard for relevancy, these exhibits should have been admitted by the judge. Fed. R. Evid. 401.

Exception #7: The ALJ's failure to find that ALPA bargained with Unit 1 over the layoffs of individual employees.

Argument

The Acting General Counsel has argued that any asserted past practice of layoffs did not amount to a waiver of Unit 1's right to demand bargaining over layoffs in 2009 and 2010, under the standard set forth in *Owens-Corning Fiberglas*, 282 NLRB 609 (1987). However, to any extent that the Board considers past layoffs to be relevant to ALPA's bargaining obligation in 2009 and 2010, the Acting General Counsel excepts to the judge's failure to find that ALPA bargained with Unit 1 over the layoffs of individual employees.

The record shows that there is a history of settlement agreements negotiated between Unit 1 and ALPA that result in employee separations being classified as "job abolishments." Collie admitted that these settlement agreements are signed by Unit 1 after negotiations with ALPA. Collie also admitted that performance is a factor in these individual employee layoffs, just like it was a factor in the larger 2008 layoff. There is no dispute that ALPA has the right to

discipline employees; however Collie conceded that ALPA instead elected to negotiate job abolishments with Unit 1. Employees who had their jobs abolished as the result of one of these agreements receive severance benefits under Section 11 of the contract. (Tr. 651-654; 685-686; 703-704; 709-717; 757-758; 762; 764).

These individual job abolishments demonstrate that there was an established past practice of negotiations between ALPA and Unit 1 concerning employee layoffs. Collie admitted that employees subject to these individual reductions in force received the same Section 11 benefits as the employees in the larger-scale layoffs, and that job performance was a factor in both types of job abolishments. Therefore, the judge should have found that ALPA had a past practice of negotiating job abolishments with Unit 1, and that finding should be considered in any determination about whether Unit 1 waived its right to bargain over layoffs in 2009 and 2010.

Exception #8: The ALJ's finding that "it was necessary to abolish [Grittner's] position." (ALJD 7:15-16)

Argument

The Acting General Counsel excepts to this portion of the judge's decision to the extent that it is a finding of fact, and not a restatement of ALPA's position. There is no evidence that it was *necessary* to abolish Grittner's position.

Exception #9: The ALJ's finding that "no employee whose anniversary date occurred after the expiration of the agreement was permitted to receive their merit pay entitlement." (ALJD 10:19-21)

Argument

The Acting General Counsel excepts to this portion of the judge's decision to the extent that it is a finding of fact, and not a restatement of ALPA's position during negotiations with Unit 1.

An employer may not unilaterally modify employees' mandatory terms and conditions of employment absent a good-faith impasse. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). A merit pay plan is a mandatory subject of bargaining that survives the expiration of the contract, absent agreement between the parties to the contrary. *Anderson Enterprises*, 329 NLRB 760, 777 (1999), *enfd.* 2 Fed.Appx. 1 (D.C. Cir. 2001); *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996). The evidence in the record demonstrates that the contract's merit pay rates continued past the agreement's expiration date because, unlike other provisions in Section 16, the merit pay rates have no expiration date.

The merit pay percentages in Section 16 of the contract have beginning dates, but there are no end dates. The most-recent merit pay rates are "effective" on April 1, 2008. However, an examination of Section 16 shows that in other areas, the parties know how to include ending dates when they want them. For example, in Section 16(A)(1), the contract specifies that the across-the-board increase shall be zero percent during the period April 1, 2008, *through March 31, 2009*. (emphasis added) Similarly, in Section 16(D), the contract provides for maximum FICA contributions during periods with defined beginning and ending dates. Likewise, Section 16(E)(6) specifies that the ALPA Performance Program will "commence on April 1, 2008, and shall be in effect through March 31, 2009." And finally, Section 16(F)(2) specifies a beginning date and an ending date for a compensatory time-off program for exempt employees. Therefore,

a fair analysis of this section shows that if ALPA had wanted to include an end date for the merit pay percentages, it certainly knew how to do so, but apparently chose not to.²

Additionally, ALPA's claim that merit pay had to end on March 31, 2009, because it didn't know what rates to pay after that date is contradicted by ALPA's own conduct. Collie testified that merit pay could not continue past March 31 because ALPA would not know what rates to pay employees after that date. (Tr. 664:2-6) Despite claiming to not know what merit rate to enter into the payroll system after March 31, Collie admitted that ALPA paid four employees merit raises after March 31, though she claimed that this was a clerical mistake. (Tr. 275:8-10; 512:14-16; 664:7-15)

Thus, the evidence shows that Respondent's unilateral discontinuance of the merit pay program after March 31 was an unlawful unilateral change because ALPA had not bargained to a lawful, overall good-faith impasse. Additionally, the evidence shows that the merit pay rates continued beyond the contract's expiration date because these sophisticated parties did not include an expiration date for the merit pay percentages in their agreement.

Exception #10: The ALJ's failure to find that the *Stone Container* exception was also inapplicable in this case because: (1) the parties were not negotiating a first contract, (2) merit increases were given throughout the year, rather than on a single specific date; and (3) the discontinuance of those increases was a permanent, rather than a temporary change. (ALJD 11, fn13)

² Respondent argues that Respondent's Exhibit 26 demonstrates that the merit pay percentages did have established end dates. This exhibit is a summary of tentative agreements prepared in March 2008, which purports to show that the merit pay rates expire on March 31, 2009. However, this expiration date was not included in the parties' final collective-bargaining agreement, GCx 42, and ALPA has not introduced evidence to explain why this term was omitted. However, Jim Johnson admitted that the language used in the contract is important to avoid misinterpretation questions. (Tr. 443:9-25)

Argument

In his decision, the judge rejected Respondent's defense that it was privileged to change the merit pay program under the Board's decision in *Stone Container Corp.*, 313 NLRB 336 (1993) because Respondent did not give Unit 1 advance notice and opportunity to bargain about the change. However, the judge should have found additional reasons that the *Stone Container* exception did not apply to the facts of this case.

The *Stone Container* case outlines an exception to the general rule that an employer must refrain from individual unilateral changes until an overall impasse is reached. *Stone Container Corp.*, 313 NLRB at 336, citing *Bottom Line Enterprises*, 302 NLRB 373 (1991). See also, *TXU Electric Co.*, 343 NLRB 1404 (2004), *Neighborhood House Association*, 347 NLRB 553 (2006), and *St. Mary's Hosp. of Blue Springs*, 346 NLRB 776 (2006). This exception is permissible when the change concerns a "discrete event" that arises during the course of bargaining. *Stone Container*, 313 NLRB at 336. However, in this case, there is no "discrete event" when it comes to Respondent's merit pay program. Each employee's merit pay is based on the employee's annual evaluation. With approximately 160 unit employees, these evaluations occur on a rolling basis throughout the year, and not as a single "discrete event" as in the cases cited above. ALPA's discrete-event analysis is undercut because the parties bargained for the contractual merit pay rates in advance. In the cases cited above, the disputed actions occurred annually and were tied to some factor that was unknown at the time of the raise, such as the current market conditions (*TXU Electric*), the amount of an annual federal grant increase (*Neighborhood House Ass'n*), or health-benefit plan changes necessary to prevent disruptions to employees' coverage (*St. Mary's Hospital*). Because ALPA bargained these rates in advance of any independent or

unknown factor, its argument that its merit pay program is a “discrete event” within the meaning of that term in the cited cases is unsupported.

Additionally, the *Stone Container* exception doesn’t apply because this exception has only been applied in situations where the parties were negotiating their first contract. The wages or benefits that those employers were seeking to modify had been the products of their own criteria, and not reached during bargaining with the unions. In the present case, the merit pay program was the result of a mature bargaining relationship between ALPA and Unit 1.

Finally, the *Stone Container* exception doesn’t apply because ALPA permanently eliminated merit pay payments. In *Stone Container*, the Board found that the employer’s conduct was lawful, in part, because it was only proposing to eliminate wage increases for that specific year, but not for subsequent years. 313 NLRB at 336. Here, ALPA proposed and implemented merit pay rates of 0% for the duration of its imposed contract, (GCx61) and thus further distinguishes this case from those where the *Stone Container* exception was found applicable.

Respectfully submitted,

/s/ Patrick J. Cullen

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Dated this 26th day of July, 2011

STATEMENT OF SERVICE

I hereby certify that copies of the Counsel for the Acting General Counsel's Cross-Exceptions and Brief in Support of Cross-Exceptions were served by e-mail, on the 26th day of July 2011, on the following parties:

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