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

ANSWERING BRIEF
OF THE COUNSEL FOR THE ACTING GENERAL COUNSEL

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I. INTRODUCTION

Although the trial record was developed over five days of testimony, thousands of pages of exhibits, and covered decades of bargaining history, this case boils down to a few central points, most of which are undisputed. Having admitted that it refused to bargain with Unit 1 about employee layoffs, and that it failed to furnish Unit 1 with information about those layoffs, Respondent Air Line Pilots Association (ALPA or Respondent) has violated Section 8(a)(1) and (5) of the Act unless it can show that Unit 1 clearly and unmistakably waived its right to bargain over layoffs in the collective-bargaining agreement, through bargaining history, or an established past practice.

ALPA admits, as it must, that there are no provisions in the contract that waive Unit 1's right to bargain over layoffs. Instead, ALPA goes on at length pointing out all of the contractual benefits its employees receive: that they're well-paid; that they have great health insurance; and generous severance benefits. ALPA's argument is that its employees only receive these benefits because Unit 1 ***clearly and unmistakably*** traded severance benefits in exchange for giving ALPA unfettered discretion to conduct layoffs. Of course, out of the decades of bargaining history in the record, ALPA *has not produced a single document* linking this alleged bargaining waiver with severance benefits, or for that matter, with any other benefit in the contract. ALPA points to contract language, then the bargaining waiver it seeks, but never demonstrates how it gets from point A to B; ALPA just claims that it happened without ever trying to pinpoint *when* or *where* the waiver occurred. One would think that for a waiver that is supposed to be "clear" and "unmistakable," this would be a straightforward task, but as the Judge found and the record demonstrates, it's a task ALPA has failed to perform.

Similarly, ALPA claims that Unit 1 has been uninvolved in past layoffs, when the record shows that ALPA and Unit 1 have bargained over layoffs in the past. Moreover, even if Unit 1 had elected not to bargain over past layoffs, those past waivers do not bar Unit 1 from bargaining over layoffs for all time. Absent a contractual waiver, Unit 1 retained the right to bargain over layoffs *each and every time*. Therefore, under any version of the facts, ALPA has failed to substantiate any waiver that would mitigate its admitted failure to bargain over the 2009 layoffs.

Because of these unremedied unfair labor practices, when ALPA declared an impasse in negotiations and imposed its last contract offer on May 7, 2009, including its retroactive discontinuance of merit pay, it only served to compound its unlawful conduct. Several months later, and based on its unlawfully imposed contract terms, it is undisputed that ALPA laid-off another employee, again without bargaining with Unit 1.

Accordingly, Counsel for the Acting General Counsel respectfully urges that the Board reject Respondent's Exceptions, adopt the Judge's findings that Respondent has violated the Act, order Respondent to cease its unlawful conduct, and direct that Respondent affirmatively undo the harm that it has caused - and continues to cause - to its employees.

II. FACTS

A. Background of Respondent and Unit 1.

Respondent ALPA is a labor organization with a principal office in Herndon, Virginia, that represents approximately 53,000 airline pilots working at airlines across the United States and Canada. (ALJD 2:24-40; Tr. 48:2-6; 338:3-5) ALPA is governed by elected pilot leaders, who sit on various boards and councils, one of which is the Executive Council (REx 3; Tr. 308:17-23) During the time period relevant here, Capt. John Prater was the President of ALPA,

and Capts. Paul Rice, Bill Couette, and Randy Helling served in vice-president capacities. (REx. 3) These four national officers, plus 14 executive vice-presidents (who represent airlines or groups of airlines) comprise ALPA's Executive Council. (Tr. 308:24-309:1; 339:22; 340:17-18) Below the national level, ALPA is organized into Master Executive Councils, or MECs, which are governing bodies of pilot groups within ALPA, and are roughly analogous to local unions. The distinction, however, between MECs and traditional union locals is that MECs are organized by airline, and not by geography. As examples, there is a Delta MEC and a FedEx MEC. (Tr. 79:1-17)

The day-to-day operation of ALPA is overseen by General Manager Jalmer Johnson, who serves as the intersection between ALPA's staff employees and its elected leadership. (REx. 3; Tr. 336; 343) Jalmer Johnson has worked for ALPA since 1981, and has served as General Manager since 1999. Howard Pike was General Manager before Jalmer Johnson. (ALJD 3:32; Tr. 335:22-24; 336:4-5; 374:25-375:2; 765:8-10)

Kelly Collie has been ALPA's Director of Human Resources since September 2005. (ALJD 3:33; Tr. 70:11-14; 482:6-8; 483:4-6) She has worked for ALPA since 1988, and has worked in the HR department there since 1992. (Tr. 482:9-24) Jan Briel served as Director of Human Resources from 1993 until Collie took over in 2005. (Tr. 483:7-11)

ALPA's primary source of income is dues revenue from its pilot members, which at the time of trial was approximately $100 million annually. ALPA's dues income is affected by a number of factors, including the number of pilots it represents and the pilots' levels of income. (Tr. 343:13-14; 344:5-8; 353:19-20)

For several decades, the employees of ALPA have been represented by their own unions: The Union of ALPA Professional and Administrative Employees, Unit 1 and The Union of

ALPA Professional and Administrative Employees, Unit 2, commonly referred to as Unit 1 and Unit 2. Despite the similarity in names, these unions are separate entities and are not affiliated with each other. (Tr. 65:12-14) Unit 1, the Charging Party in this case, represents the professional staff, including attorneys, contract administrators, economic analysts, and information technology professionals. (ALJD 2:40-42; Tr. 65:12-14; 486:5-17). Unit 1, or its predecessors, has represented ALPA employees since at least 1951. (Tr. 65:22-25; *Air Line Pilots Assoc.*, 97 NLRB 929 (1951)) At the time of trial, Unit 1 represented approximately 168 employees, with about 100 of those employees working at the Herndon office. (ALJD 3:fn4; Tr. 65:15-20; 486:18-23)

Unit 2 represents ALPA's clerical and administrative staff. (ALJD 2:40-41; Tr. 487:4-10) Unit 2 represents approximately 90 employees, and most work in Herndon. (Tr. 487:11-14)

Unit 1 has negotiated a series of collective-bargaining agreements with ALPA. The most-recent contract covering Unit 1 employees spanned from 2004 through 2009, and expired on March 31, 2009. (GCx 42) This contract was negotiated in 2008, and generally extended the terms of the 2004-2008 agreement for one additional year, though with some modifications. (GCx 42) Unit 2 negotiates separately for its own contracts. (GCx 62)

B. The Parties Begin Bargaining for a Successor Contract in January 2009.

1. The Bargaining Teams

In 2009, ALPA's bargaining committee was chaired by Director of Human Resources Collie, who has served as chief spokesperson for ALPA in contract negotiations since becoming HR Director in 2005. (ALJD 3:33; Tr. 70:25-71:2; 484:22-23; 485:2-3) In addition to Collie,

ALPA was represented by Jim Johnson, Margarita Lorenzetti, Art Luby, and Dave Krieger. The record shows that Collie, Jim Johnson, and Lorenzetti attended all, or virtually every bargaining session. (Tr. 70:5-10; 416:25-417:7; 702:1-6).

In addition to chief spokesperson, Collie also served as ALPA's note taker, and her notes were essentially the official ALPA bargaining committee notes. (REx. 15; Tr. 417:10-12; 421:11-19; 602:16-18)

Jim Johnson is a senior managing attorney, who has worked for ALPA since 1980. (Tr. 70:15-17; 368:1-7; 369:3-4) While obviously an experienced attorney, he repeatedly emphasized that he is not a labor lawyer. (Tr. 386:24-387:1; 387:17-18: 396:11-12; 396:18-397:1; 437:3-4)

During negotiations in 2009, Margarita Lorenzetti was ALPA's Director of Finance, and she has remained in this job through the time of the hearing. (Tr. 702:1-3; 711:16-18). ALPA did not call Lorenzetti, Luby, or Krieger to testify, though at least Lorenzetti and Luby remained in supervisory capacities at the time of trial. (Tr. 651:4-11)

Unit 1's negotiating committee was co-chaired by Wayne Klocke and Russ Woody. Assisting them were Eric Iverson and Paul Karg. All are ALPA employees. (ALJD 3:40-42; Tr. 67:9-68:9)

Klocke, who has been an attorney since 1979, has worked for ALPA since 1996, and is employed as a senior contract administrator in the Representation Department. Klocke's office is located in Euless, Texas, near Dallas-Fort Worth airport, where he administers collective-bargaining agreements – primarily those between American Eagle Airlines and the American Eagle pilots represented by ALPA. (Tr. 63:15-22; 64:4-19). Prior to working for ALPA, Klocke worked in public-sector labor law representing police and firefighters, but his NLRA experience is limited to one or two cases in the 1980s. (Tr. 64:15-25; 65:2-5) Klocke was present at every

bargaining session in 2009, which was the first year he served on Unit 1's bargaining committee. (Tr. 67:2-5; 137:15-16; 145:21-25)

Russ Woody was the other co-chair of Unit 1's team. (Tr. 67:13-15) Woody is an attorney who works in ALPA's Chicago office who specializes in retirement and insurance benefits. (Tr. 67:19-21)

Eric Iverson, an attorney since 1997, works in ALPA's Memphis, Tennessee, office as a contract administrator for pilots employed by FedEx. (Tr. 67:22-68:1; 180:24-181:21) Iverson was present for every bargaining session in 2009, except for one session, which occurred post-implementation. (Tr. 184:7-9). Iverson's primary role during bargaining was to serve as Unit 1's note taker, and maintaining the records of the parties' various contract proposals. (Tr. 68:2-7; 182:25-183:2; 183:18-21; 184:10-17) With the exception of a summer externship, Iverson has no NLRA experience. (Tr. 182:7-13)

Paul Karg is a non-attorney employed at ALPA's Herndon office as an economic analyst. As a member of Unit 1's negotiating committee, his primary role was economic and financial analysis of the bargaining proposals. (Tr. 68:8-16)

2. The Delta-Northwest Merger is the Background for Negotiations.

As a backdrop for these negotiations, in October 2008, Delta Airlines and Northwest Airlines completed their merger into a single carrier. (Tr. 233:14-24; 596:8-9) ALPA's managers began talking to the pilot leaders about combining the Delta (Atlanta) and Northwest (Minneapolis-St. Paul) MECs following the merger, and Collie began looking at the Atlanta and Minneapolis-St. Paul MECs to try to identify any positions that may be redundant. (Tr. 596-597) As Delta was the larger pre-merger carrier, in Collie's view, the momentum appeared to move

toward Atlanta. (Tr. 597-598) Therefore, in the fall of 2008, Collie travelled to the Minneapolis office to meet with the employees there, to talk about whether any of them were willing to relocate, and to try to discern what options were and were not available to ALPA. (Tr. 598-599) Collie did not inform Unit 1 of her trip to Minneapolis or her meetings with the employees there. (Tr. 599:20-600:2)

Klocke testified that the Unit 1 team had designated the Minneapolis office as an area of inquiry following the Delta-Northwest merger, and said that Unit 1 was interested in what was in store for the Minneapolis office. (Tr. 77:8-12) According to Iverson, mergers create uncertainty, but not necessarily poor outcomes. While it was possible that an MEC office would close, a merger could also increase ALPA's dues revenue because of increased pilot wages. There was simply an air of uncertainty. (Tr. 250-251) Nonetheless, Klocke had concerns that there would be a consolidation of job duties, and recognized the possibility that ALPA might close one of its offices and lay off some employees. (Tr. 81:16-23)

In preparation for upcoming contract negotiations, on October 24, 2008, Klocke submits a written request for information to Collie. (GCx 3) In general, ALPA provided the requested information to Unit 1. (Tr. 68:20-69:13)

3. ALPA Decides to Conduct a Layoff, But Does Not Inform Unit 1.

In December 2008, the ALPA Executive Council met to consider and approve a revised budget plan that had been prepared by Jalmer Johnson. This budget plan provided for employee layoffs in early 2009. (Tr. 348-350) While Collie admitted that the Executive Council knew the departments that would be affected by the layoffs, she specifically denied that the Executive Council approved the identities of the employees selected for layoff. (Tr. 690:9-691:9)

However, Collie's denial is difficult to reconcile with Jalmer Johnson's testimony that the pilots, in fact, do consider which employees will be laid off. Specifically, Jalmer Johnson testified:

Q: …in the ALPA organization pilots make decisions. Do they make decisions on layoffs?

A: The short answer is yes.

* * *

A: - - and for example, the reference to a revised 2008 budget. When we develop budgets, we do it with the national officers, including the vice president of finance….So the budgets that we develop are ones that the national officers review, have input on…

A: Sure the answer's yes because, as I said, the pilots make the - - vote on the budget, and if the budget contains furloughs, they would have voted on furloughs.

Q: Do they make decisions on whether a particular individual is going to be laid off or not?

A: In the discussions that we have with national officers, we evaluate the service requirements and so we look at whether or not we need negotiators versus pilots or employees to do contract enforcement, for example. And that discussion takes place with the national officers. So yes, they have involvement in those broader discussions based on the needs and requirements of the Union.

Q: In your experience, has ALPA ever laid off an individual employee without approval from some pilot organization or the executive board or the executive council?

A: I - - unless they would have been laid off, for example, for discipline purposes - -

(Tr. 353:21-355:2)

Moreover, when discussing layoffs in 2008, Johnson testified that:

Q: And the national officers approved the names on the list, didn't they?

A: The national officers approved the functions which were tied in the list.

Q: Well, let me ask you this. What was on the list? Were they names or positions?

A: There were both, if I recall.

Q: Okay. And did the national officers approve both the names and the positions?

A: My recollection is, yes.

(Tr. 361:23-362:7)

Although the latter testimony refers to layoffs earlier in 2008, Kelly Collie testified that the process was the same in 2009 as it was in 2008. (Tr. 669:1-3) Regardless of which version is accurate, ALPA admits that it made a decision at this December 2008 Executive Council meeting to eliminate jobs. According to Collie though, Jalmer Johnson gave her the option of immediately severing the affected employees, or waiting until after the holidays. Collie decided that waiting until after the holidays was the "appropriate time." (Tr. 601:4-16; 696:15-17)

4. Bargaining Begins.

On January 5, 2009, the parties met at ALPA's Herndon office to begin negotiations for a successor collective-bargaining agreement. (Tr. 67:6-8; 70:2-4) Negotiations began with the presentation of Unit 1's opener, and a discussion about each of the proposals it contained. (GCx 4; 71:10-24) Regarding Section 11 of the Agreement, Unit 1 made a modest opening proposal to "Extend and improve recall and preferential hiring rights." (GCx 4) Klocke testified that Unit 1 wanted to improve recall and preferential hiring rights, but job security "was not a main focus" on January 5. (Tr. 71:10-24)

During this discussion about Section 11 – and still unaware of the Executive Council's decision to approve a layoff in early 2009 – Woody told ALPA that Unit 1 needed to know the company's plans for the Minneapolis office. Collie responded that there were going to be "significant job changes" in Minneapolis, but she did not mention layoffs. (Tr. 77:13-17; 83:9:14; 189:1-2) Woody responded that Unit 1 needed to look at Minneapolis and make sure "nothing fell through the cracks." (Tr.188:11-21; GCx 43, p.4)

Later that afternoon, ALPA presented its opening proposal. Among its offers, ALPA was proposing to eliminate from "Section 10 – Moving Allowance" the home purchase program and home marketing program, which were benefits employees received for job-related moves. (Tr. 189:6-11; REx 34, p152; GCx 42 § 10.F-G) Iverson told Collie that these relocation benefits were hardly ever used, and asked why ALPA was trying to eliminate these provisions now. Collie responded that there were going to be more opportunities for these contract provisions to be triggered in the upcoming year. (Tr. 189:12-17)

Collie's cryptic comments about upcoming changes to the Minneapolis office and Section 10 relocation benefits only served to stoke Unit 1's concerns about the potential consequences of the Delta-Northwest merger. And so, during the next break in negotiations, Unit 1 drafted a supplemental request for information, and presented it to ALPA later in the afternoon of January 5th. (Tr. 78:5-11; 80:5-9; 80:12-23; 189:18-24; 190:1-6; 637:5-22; GCx 6) Relevant to this proceeding, Unit 1 requested:

> 1. The effect management expects the Delta/Northwest merger will have on staffing of MEC and/or field offices serving either of the two pilot groups immediately prior to the merger, in as much detail as possible. Specifically, and without limiting the generality of the foregoing:
>
> ***
>
> b. What specific Unit 1 positions, if any, in MSP and/or DTW will be eliminated, what specific individual Staff Employees in MSP and/or DTW will be terminated, and when will the eliminations and/or terminations be effective? (GCx 1-EE ¶8(a); GCx 6)[1]

The parties met the following day, January 6, and the discussion about the Minneapolis office and the Union's information request intensified. Collie said she did not understand how

[1] MSP and DTW are abbreviations for the ALPA offices in Minneapolis-St. Paul and Detroit, respectively. (Tr. 79:18-24) Klocke testified that GCx 6 was erroneously dated "January 5, 2008" instead of 2009 (Tr. 77:23-25); however, there is no dispute that this request was made and received by ALPA on January 5, 2009. See Respondent's Amended Answer, GCx 1-PP ¶8(a).

Question 1 of the information request related to bargaining. Klocke responded that Unit 1 was going to have proposals on severance, recall, and rehire, and ALPA's plans for Minneapolis were going to impact Unit 1's proposals. (Tr. 190:25-191:3) Collie said that there were different cultures at Delta and Northwest, but that she didn't have any specifics to share with Unit 1 about what was going to happen. Iverson immediately challenged Collie by confronting her with the statement she made only a day earlier that ALPA wanted to eliminate some Section 10 relocation benefits because there would be more opportunities to use them in the upcoming year. Seeing that Iverson was becoming heated, Klocke intervened, and told Collie that she should consider the Union's request for information as a continuing obligation. (Tr. 191:1-21; GCx 43: Jan.6, p. 4) At this point, Woody asked Collie what ALPA's plans were for the Herndon office, and Collie responded that there was a meeting scheduled for the following day, and that she would get back to them.[2] (Tr. 191:23-192:2)

The discussions about Section 11 continued, and Iverson asked when ALPA was going to present its proposal on Section 11 because it was left as "to be proposed" in their opener. Collie responded that Unit 1 could expect ALPA's proposal around February 10th to the 12th. (Tr. 192:11-17; REx 34, p.152) Woody replied that Unit 1 wanted to talk about what was going to happen in Minneapolis and wherever else before a decision was made. Iverson testified that Woody was emphatic about Unit 1 being involved before any decision, and underlined "before" in his bargaining notes to reflect Woody's emphatic tone. (Tr. 192:23-193:3; GCx 43, Jan. 6, p.7) Klocke emphasized that Unit 1 wanted to be a part of formulating any proposal. (Tr. 193:5-6)

Collie, appearing frustrated by Unit 1's demands, asked if then-Unit 1 president Jay Wells knew what Unit 1 was doing at the bargaining table. It is undisputed that Klocke

[2] Collie's statement is consistent with Klocke's memory that it was around January 6 when Wells notified him of a meeting on January 7, and asked Klocke to attend. Klocke testified that Unit 1did not know what the scheduled meeting was about, but they anticipated bad news. (Tr. 84:25-85:4)

responded that Wells was aware of, and had authorized, the Union's demand to bargain over layoffs under both the extant collective-bargaining agreement, and any successor contract. (Tr. 83:18-84:5; 193:9-21; 423:25-424:2; 661:9-16)

Klocke said that Unit 1 expected to bargain on reductions in force. Collie replied that that has not been Unit 1's position in the past. Klocke answered by saying, "You are on notice that if that is true, this is a change of philosophy; we are insisting on bargaining on reductions in force." (Tr. 85:12-16)

Klocke's response is corroborated by both Iverson's bargaining notes, and the testimony of Collie and Jim Johnson, though Collie appears to claim that Klocke admitted Unit 1 was changing from its past position. (Tr. 422:3-21; 626:3-5; GCx 43, Jan. 6, p.7) Klocke testified that in making this bargaining demand, he was not conceding what Unit 1's past practice was, but instead he was informing ALPA that even if their assertion was true, Unit 1 was unequivocally taking a different tack in the future. (Tr. 86:12-14) Jay Wells confirmed that he would not describe 2009 as a "change in philosophy." (Tr. 318:24-319:1) Although Jim Johnson appears to misplace the timing of Klocke's statement, he corroborates that it was made and that Unit 1 was demanding to bargain over layoffs. (Tr. 422:3-21; 423:10-11; 473:7-23)

To further emphasize Unit 1's position, Woody told ALPA that Unit 1 wanted to be involved in all levels of what was going on. According to Iverson, Woody told ALPA that Unit 1 wanted to be involved in "A, B, C, D, and if it's B, what parts in B – We want to be involved in it all." (Tr. 193:22-194:10) Klocke confirms this when he testified that his bargaining demand was not limited to Minneapolis, but instead he had "clearly and unequivocally" said that Unit 1 wanted to bargain about all reductions in force. (Tr. 85:21-86:2)

C. The Day After Unit 1 Demands to Bargain, ALPA Announces a Layoff.

On the afternoon of January 7, Wells and Klocke went to what ALPA had billed as a "budget meeting" at the Herndon office. ALPA was represented by Collie, Jim Johnson, and Director of the Legal Department, Jonathan Cohen. Also present was Unit 2 president Richard Bowers and another Unit 2 representative. (Tr. 87:6-18; 286; 420:14-20; 463:17-22)

Collie opened the meeting and said that ALPA had budget issues and had decided to conduct a reduction in force. She distributed a document showing that five employees in Herndon would be laid off. (87:24-88:1; GCx 7) Klocke testified without contradiction that a management representative acknowledged that Unit 1 had recently demanded to bargain about layoffs, but asserted that the layoff decision had been made in December 2008 and delayed to spare the employees' Christmas holiday. (Tr. 90:23-91:5) Collie said that the RIF would commence on the following day and continue through the remainder of the week. (Tr. 91:10-16; 287:3-13)

It is undisputed that Wells asked Collie for the names of the employees and the positions selected for layoff, and that ALPA refused to provide this information. (Tr. 92:13-17; 287:14-20; 640:4-15) Collie told Unit 1 that ALPA would not provide this information "consistent with management's past practice." (Tr. 287:14-20) Instead, management directed Wells to the chart showing the total number of positions eliminated and the resulting savings to ALPA's budget. (Tr. 92:13-17.)

The names and positions of the employees selected for layoffs were necessary so Unit 1 could evaluate whether or not it could do anything through bargaining for the affected employees. (Tr. 288:3-8). The chart distributed by ALPA did not contain enough information for Unit 1 to identify the employees or their positions. (Tr. 92:24-93:4) Unit 1 did not find out which

employees had been selected for layoff until after the reduction in force was carried out. (Tr. 211:7-18) Although during this meeting Unit 1 did not repeat its earlier demand to bargain over layoffs, Jim Johnson testified that had such a demand been made, ALPA would have refused to bargain. (ALJD 6:10-11; Tr. 464:12-21)

Following the layoff announcement, Wells and Klocke went to a downstairs conference room. (Tr. 93:6-7) Shortly thereafter, Jim Johnson – who is also Wells' supervisor – came into the room. Jim Johnson told Klocke and Wells that he had been sent down to distinguish the Herndon layoffs from Minneapolis. Johnson said that ALPA would not bargain with Unit 1 about the decision to layoff employees in Minneapolis, but would discuss the effects of those layoffs. (Tr. 93:16-94:2; 283:8-9; 288:10-23; 439:19-21). Klocke and Wells – still in shock from the announcement of layoffs – didn't make much of any response to Jim Johnson, and he left. (Tr. 94:5-6; 288:17-20)

On January 8 and 9, ALPA laid off Herndon employees Marc Bergeron, Stephen Nagrotsky, Richard Parker, Martin Sobol, and John Wiley. (Tr. 288:24-289:3; REx 17)

D. Unit 1 Reacts to the Layoff Announcement.

According to Unit 1 president Wells, the January 2009 layoffs in Herndon cast an immediate chill over the membership. (Tr. 289:4-7) At the bargaining table, the strategy and tone of the negotiations changed. The focus of Unit 1's bargaining objectives shifted toward job security. Klocke testified that ALPA's decision to layoff five employees with an average seniority of 17 years, along with the corresponding lack of bargaining and information about the layoff process "changed the focus of negotiations." The Unit 1 committee was "trying to save jobs," and was very concerned about preventing the layoff of senior employees. (Tr. 95:20-96:3)

Eric Iverson added that after the layoffs, Unit 1's strategy "definitely" changed and they were "throwing our weight onto bargaining on the RIFs." (Tr. 139:1-13; 202:4-13)

From Unit 1's perspective, the tone of negotiations also changed. Klocke testified that the Herndon layoffs started the negotiations off on a "very, very bad note, to say the least" and made the negotiations "more difficult" and "increased the contentiousness" at the table. (Tr. 139:1-13) Upon learning of the layoffs, Iverson was "infuriated" – particularly because Unit 1 had specifically asked about ALPA's plans at Herndon, but wasn't told. (Tr. 196:2-8). Iverson testified that there was a different and negative tone in the negotiations after the RIFs were announced, and the resulting atmosphere was one of mistrust. (Tr. 202:8-13)

When bargaining resumed on January 13, Unit 1's negotiating team delivered a letter to Collie. Contained in the letter was a renewed demand to bargain over layoffs and a request for information. (GCx 8)

Specifically, Unit 1 demanded to bargain concerning: (1) any decision to lay off Unit 1 employees; (2) the number of employees to be laid off; (3) possible ways to avoid or mitigate such layoffs, or to reduce the number of employees to be laid off; and (4) the manner in which employees to be laid off are selected. In connection with this request to bargain, Unit 1 asked for several categories of information; two of which are relevant here. They are:

(1) a detailed explanation of how each Unit 1 employee laid off to date or proposed to be laid off in the future was selected; and

(2) the identities of the employees selected for layoff. (GCx 1-EE ¶ 8(c); GCx 8)

Unit 1 emphasized in this letter that its demands to bargain and requests for information encompassed not only future layoffs, but the recently-announced Herndon RIF. (GCx 8, p.1, ¶ 3) In response to Jim Johnson's comment made on January 7 that ALPA would only bargain over

the effects of Minneapolis layoffs, Unit 1's letter closed by stating that it was demanding to bargain over *all* of the issues affecting Minneapolis employees, and stated that no action should be taken with respect to those employees until bargaining was completed. (GCx 8, p.2, ¶ 2 emphasis in original)

When Unit 1 delivered its letter to Collie on January 13, Klocke was "very particular" that this was "a serious legal matter" and expressed a sense of urgency in receiving a response from ALPA. (Tr. 198:24-199:8) The following day, Klocke repeated that this was a big issue for Unit 1, and asked for a response by the end of the week. (Tr. 199:16-21) Iverson testified without contradiction that in response to Unit 1's demand to bargain over layoffs, no one from ALPA's negotiating team asserted that Unit 1 had waived its right to bargain over this subject. (Tr. 199:9-11)

ALPA responded to Unit 1's letter ten days later. (REx 16.) In its response, ALPA generally denied it had breached its obligation to bargain, and stated that it disagreed with Unit 1's factual assertions. The letter closed by stating that ALPA was compiling the requested documents regarding the January 2009 layoffs to which Unit 1 was entitled; however, Collie admitted that the requested information was not furnished to Unit 1. (REx 16; Tr. 640:16-641:6; See also, 210:21-211:6; 211:23-212:21; 213:20-23) During direct examination, Collie testified that there was no document that set forth a list of criteria that were applied by ALPA in each situation to determine which individuals or positions would be abolished. (Tr. 642:5-11) Even so, there is no testimony or documents in the record showing that ALPA ever informed Unit 1 that ALPA could not provide the requested information because it did not exist in documentary form.

E. Negotiations Resume in February and Discussion About Minneapolis Layoffs Intensifies.

1. Discussions About Minneapolis Layoffs Continue.

Contract negotiations resumed during the week of February 9 to February 13, and the discussion opened with Minneapolis. (Tr. 96:18-20; 200:7-8) Klocke asked about Minneapolis, and Collie informed Unit 1 that she and Director of the Representation Department Bruce York had a meeting during the prior week with the Minneapolis employees. Collie told Unit 1 that she informed the Minneapolis employees that ALPA would have a smaller office presence in Minneapolis, but they would have more clarity at the end of the month, adding that ALPA was going to be discussing the situation with Unit 1. (Tr. 200:11-21; GCx 5, Feb. 9, p. 1) Klocke asked ALPA for more "meat on the bone," and Collie responded that ALPA just had a general thought on what happened and what was going to happen. (Tr. 201:10-12; GCx 5, Feb. 9, p. 4; GCx 43, Feb. 9, p. 3)

Collie confirmed during these discussions that there would be a smaller office in Minneapolis and told Unit 1 that there would be seven fewer employees in Minneapolis which would result in a savings of $837,000 for ALPA. (Tr. 97:5-9; 97:15-23; 201:15-21) Unit 1 did not view the $837,000 figure as an invitation to bargain. Rather, by announcing this $837,000 figure and the 7 positions scheduled for elimination, Unit 1 concluded that ALPA knew which 7 people it planned to lay off because not all of the employees in Minneapolis receive the same pay. (Tr. 97:24-98:22; 201:22-25)

On February 10, Unit 1 submitted its first proposal on Section 11 after the Herndon layoffs. (GCx 9) This proposal expanded recall rights, health benefits, and severance pay in an effort to address the developing situation in Minneapolis. (Tr. 101:19-22; GCx 9) Iverson

confirms that Unit 1 was starting to concentrate its efforts on the Minneapolis office, and that this proposal was part of a greater radicalization on Unit 1's part. In its proposal, Unit 1 was seeking to have Atlanta treated as the same location as Minneapolis, which would give any laid-off employee expanded options for recall, to provide up to five years of health insurance eligibility, and double the normal severance pay (two years instead of one year.) (Tr. 202:21-203:3; GCx 9)

Collie asked Unit 1 how it would justify this special treatment for the Minneapolis employees to the union membership. Iverson responded that Unit 1 had asked to bargain about the Herndon employees, but ALPA refused. Collie responded that she disagreed with Iverson's assertion. Iverson answered that Unit 1 was still demanding to bargain, but ALPA should just let Unit 1 deal with its membership. (Tr. 203:6-15; GCx 43, Feb.10, p.2)

Unit 1 proposed measures in an effort to try to mitigate the RIFs in Minneapolis. Woody suggested that employees should be given the opportunity to "raise their hand" to volunteer to be laid off, but according to Klocke, ALPA did not show any interest in those measures. (Tr. 99:1-18; GCx 5, Feb. 10 (Tuesday), p. 1)

At the close of negotiations that day, Collie cryptically informed Unit 1 that the layoffs may not be limited to Minneapolis. (Tr. 203:20-22; GCx 43, Feb. 10, p.3) Upon hearing this, Iverson testified that he "nearly jumped out of my skin" and the "hair was standing up on the back of his neck" because he thought he was the person selected for the RIF. (Tr. 203:23-204:2)[3] Klocke also believed that one of the negotiating committee members could be a target for layoff. (Tr. 100:17-18)

[3] This reference is part of the parties' Joint Motion to Correct the Transcript, which the Judge granted and received as GCx 79. (ALJD 2:fn3)

When bargaining resumed the following day, Section 11 and Minneapolis remained the topics of discussion. (GCx 43, Feb. 11, p. 1) Woody told ALPA that Unit 1 was "waiting for the other shoe to drop" and felt that they were being forced to "throw darts down a pitch black hallway at a target we can't see." (Tr. 204:16-23)

Collie, apparently as a follow-up to her ending remark on February 10, informed the Unit 1 team that there would be a layoff "south of Minneapolis." (Tr. 97:5-9; GCx 5, Feb. 11, p. 1; GCx 43, Feb. 11, p. 1) Iverson testified that he believed he or someone else was targeted for this RIF, as all of the employees on Unit 1's negotiating committee work south of Minneapolis. (Tr. 100:10-15; 205:19-20)

Woody told ALPA that he was astonished and could not believe the amount of secrecy that was going, adding that he had never seen anything like this before. (Tr. 205:10-13) Woody added that ALPA's refusal to provide Unit 1 with information about the proposed layoffs was making Unit 1 try to put "contractual straightjackets" on ALPA, and that had ALPA worked collaboratively with Unit 1, things might have turned out differently. Woody said that ALPA was "driving [Unit 1] to the proposals that [it] was making." (Tr. 209:1-10) Iverson described the situation by saying, "We were putting all we had into [Section] 11 and the RIFs." (Tr. 209:10-11)

2. Unit 1 Repeats Its Request for the Names of Employees Who Will Be Laid Off.

During these discussions, Klocke informed ALPA that Unit 1 needed to know the names of the employees who had been selected for layoff. (Tr. 96:24-97:2; 209:18-19; GCx 5, Feb. 11, p.1; GCx 43, Feb. 11, p. 3) Jim Johnson responded by asking what would change if ALPA provided Unit 1 with the employees' names. Woody responded that the names were necessary to

determine the impact on the remaining employees after the RIF, and to see if options such as job sharing, split schedules, early retirements, or other mechanisms might avoid the RIF altogether or at least help mitigate the damages to the employees. (Tr. 100:23-101:10) Woody added that Unit 1's request for the names should not set off a race for ALPA to terminate those employees because ALPA had not exhausted its duty to bargain over these layoffs. (Tr. 215:6-10)

Iverson and Collie also had an exchange about Unit 1's information request on February 11. Iverson pointedly asked Collie, "What are you saying? Are you saying you are not giving us the names?" Collie responded, "We are not giving you the names." Iverson continued, asking, "So I'm clear, you are not going to give us the names today, tomorrow, or any time in the future? You're refusing to give us the names?" To which Collie repeated, "We are not giving you the names." (Tr. 97:10-14; 103:4-8; 209:21-210:3; REx 15 at ALPA 012340 - K. Collie Notes)

Jim Johnson recalls that during the week of February 11, Unit 1 specifically asked for the names of the employees to be RIF'd (Tr. 427:12-16). He testified that ALPA's response to this request was that ALPA had never given the names out, and it did not feel it had to give them out. Jim Johnson cited two particular reasons for withholding the names: (1) the names on the list might change; and (2) Unit 1 declined to keep the names confidential from the affected employees. (Tr. 427:18-428:11) Klocke confirms that either Jim Johnson or Collie listed confidentiality as a concern. He testified that ALPA said they might be willing to provide the names if Unit 1 kept them confidential. Klocke explained that Unit 1 rejected this confidentiality proposal because it was concerned that agreeing to these terms would not be consistent with the duty of fair representation that Unit 1 owed to the affected employees. (Tr. 103:15-22) Although Unit 1 declined to agree to keep the names confidential, Klocke was "absolutely not" dropping the Union's request for this information. (Tr. 104:2-5) Jim Johnson confirmed that ALPA

understood Unit 1's position when he testified, "[t]hey felt they had a right to have [the names] upfront and they didn't want them confidential - - confidentially." (Tr. 428:12-18) Neither party proposed terms for a written confidentiality agreement. (Tr. 103:23-104:1; 428:12-16)

3. Unit 1 and ALPA Exchange Proposals on Section 11.

ALPA and Unit 1 exchanged additional proposals on Section 11. ALPA largely proposed that the terms of Section 11 should remain unchanged from the then-current contract. (Tr. 101:23-102:2; GCx 10) In response, Unit 1's proposal continued to place emphasis on protecting long-term, full-time employees. (Tr. 102:3-10; 614:2-7; GCx 11)

When questioned during cross-examination about whether Unit 1 believed in February 2009 that seniority should play some role in Minneapolis, Iverson responded that he did not know how to answer the question because the parties were never able to actually bargain about this subject as a result of ALPA's refusal to provide the employees' names to Unit 1. (Tr. 232:16-18) Similarly, Iverson testified that Unit 1 could not offer proposals regarding a layoff process in Minneapolis because Unit 1's committee didn't know who they were bargaining for in the absence of the requested information. (Tr. 233:2-5) In any event, it's unclear what effect any Unit 1 proposals would have had because Jim Johnson characterized the discussions as Unit 1 demanding to bargain, and ALPA saying that it was there to "meet and confer." (Tr. 424:7-425:24, see also 18:9-13)[4]

[4] This reference is part of the Joint Motion to Correct the Transcript.

F. ALPA Begins Laying Off Employees in Minneapolis and Houston.

As mentioned above, on January 6, 2009, Unit 1 had asked ALPA to provide the names and positions of employees selected for layoff in Minneapolis and Detroit. (GCx 6, Item 1(b)) On February 18, 2009, Collie called Wells and said she was going to Minneapolis to conduct a layoff. Wells asked for the names of the employees who had been selected for layoff, but Collie refused to provide this information. Instead, Unit 1 was told that the layoffs would be carried out in alphabetical order. (Tr. 289:8-19) Collie admits that ALPA did not furnish the information requested by Unit 1 until after the layoffs occurred in February. (Tr. 639:22-25)

By letters dated February 20, 2009, ALPA notified Minneapolis employees Doreen Clark, Midge Jamgochian, Mary Nadeau, Rob Plunkett, and Susan Schemm that their positions at ALPA were being abolished.[5] Each of these employees received a date when their layoff would be made effective, which ranged from as early as February 24 and until June 30. (REx 17) Unit 1 did not learn which specific employees had been selected until after the layoffs were announced. (Tr. 289:20-25)

Less than a week later, on February 26, 2009, ALPA notified employee Jim Moody that he would be laid off effective April 26. (REx 17) Moody worked as a communications specialist in ALPA's Houston office. (Tr. 290:6-7) Unit 1 was not given any advance notice that ALPA was going to lay off employees in Houston, or that it was targeting Moody in particular. (Tr. 106-14:25; 290:8-13) After she laid off Moody, Collie called Wells from Houston to inform him that she had just laid off Moody. (Tr. 290:1-7)

On March 16, 2009, Unit 1 filed the charge in Case 18-CA-18999 alleging that ALPA had unlawfully refused to bargain over both the decision to layoff employees, and the manner of

[5] The record shows that ALPA has a history of using the terms "job abolishment," "reduction in force," and "layoff" interchangeably. (Tr. 81:24-82:2; 243:9; 386-389; 526:11-17; 527:3-4; 651:12-15)

how employees were selected for layoff. The charge also alleged that ALPA unlawfully refused to provide information about the layoffs, including the identities of the employees selected for layoff and the basis on which they were selected for layoff. This charge was transferred to Region 5 as Case 05-CA-34837 on April 2, 2009. (GCx 1-A, 1-EE ¶ 1(a)-(b))

G. Bargaining Resumes After the Layoffs.

The parties' next bargaining sessions occurred from March 10-12, 2009,[6] and then resumed from March 25 until April 1, 2009. (GCx 5; GCx 43; REx 15) On March 27, Unit 1 presented ALPA with a comprehensive package proposal, (Tr. 107:1-16; GCx 13; REx 34, p.96) Klocke explained that the term "comprehensive" meant that this proposal was a settlement package; the individual proposals were dependent on ALPA's agreement to the entire package proposal. (Tr. 107:7-13)

1. Section 11

This comprehensive proposal included Unit 1's first proposal on Section 11 since the Minneapolis and Houston RIFs were announced. In part, the proposal required "no more furloughs/RIFS/job abolishment during term of Agreement." Iverson testified that in the wake of the layoffs, Unit 1 was "desperately trying" to get some contractual layoff protections. (Tr. 721:16-722:1)

ALPA's response to Unit 1's proposal on Section 11 provided that ALPA would give 10 days' notice prior to any RIF and, upon request, ALPA would "meet with Unit 1 to discuss the RIF." (GCx 14; REx 34, p.94) Unit 1 considered ALPA's proposal to be insufficient for several

[6] The hiatus from February 13 until March 10 was not intentional; the parties could not find mutually-agreeable dates during this period. (Tr. 111:25-112:8)

reasons: the brief 10-day notice period; ALPA's insistence of "meet and discuss" rather than bargain; and because ALPA was proposing only to provide the number of affected positions and the aggregate salary amount – Unit 1 wanted the employees' names. (Tr. 108:21-109:12)

The parties' proposals on Section 11 continued to remain relatively unchanged until March 31, which was the day when the contract was set to expire. In its March 31 comprehensive proposal, Unit 1 softened its "no RIFs" proposal to provide that there would be no further RIFs during the term of the contract, unless ALPA's dues revenue dropped below a "floor" of $90 million. Unit 1 also tried to limit which employees would be subject to a layoff. (GCx 23; REx 34, p.61) Unit 1 made this proposal to address ALPA's concerns about potential declines in revenue, and to curtail the layoff of senior employees, which Klocke described as a "real sore point" for Unit 1. (Tr. 115:10-22)

2. Merit Pay

Another component of Unit 1's March 27 comprehensive proposal was its willingness to agree to a two-year wage freeze, provided ALPA agreed to Unit 1's proposal on revenue sharing and the other terms of the comprehensive package. Klocke described it as a "package deal." (Tr. 113:11-23; 154:4-25; GCx 19)

Section 16(B) of the expiring collective-bargaining agreement, entitled "Compensation," contains the provisions of ALPA's merit pay program. (Tr. 263:6-22; GCx 42) Generally, this contract section provides that each Unit 1-represented employee receives a performance evaluation annually on their anniversary date. An employee acquires his or her anniversary date in one of two ways. The first way is on the employee's date of hire. If an employee receives a promotion, he or she acquires an anniversary date based on the date of the promotion. (Tr.

278:14-23) Employees' have anniversary dates throughout the year. (Tr. 278:24-279:1; 502:22-24)

As a result of these annual evaluations, employees receive one of five possible ratings ranging from "outstanding" to "marginal." Each employee then receives a percentage pay increase based on his or her performance rating. The percentages are listed in a matrix in Section 16, along with each performance rating, and effective dates. For example, an employee rated "outstanding" on or after April 1, 2008, would receive a pay increase of 4.5%. When an employee receives a merit increase, that increase becomes part of the employee's base salary for the remainder of their employment with ALPA. Although the contract lists effective dates for the merit pay rates, it does not list ending dates. (Tr. 263-264; GCx 42)

Ideally, employees are supposed to receive merit increases on their anniversary dates, though there are occasions when employees experience delays in receiving merit increases. (Tr. 264:12-18; 502:19-21)

H. The Contract's Expiration Date Approaches.

1. Unit 1 Prepares to Strike.

As the contract neared its March 31st expiration date, Unit 1 prepared for economic action. Beginning around March 25, Unit 1 members began to conduct informational picketing at ALPA's Herndon headquarters to show support for the Unit 1 negotiating team, and to demonstrate the Union's bargaining position to ALPA. (Tr. 293:20-294:2) Klocke testified that on March 31st both ALPA and Unit 1 were concerned about economic action the other might take. (Tr. 117:16-18)

2. Unit 1 and ALPA Negotiate "Standstill Agreements."

a. The March 31st Standstill Agreement.

As the contract's March 31st deadline approached, it became apparent that ALPA and Unit 1 still had "miles to go" to reach an agreement on a new contract. (Tr. 515:4-7) Late in the evening on March 31, Collie proposed a verbal agreement to Klocke to extend the contract for 24 hours, which has been described as a "standstill agreement." (Tr. 117:19-22) While it is generally agreed that this standstill agreement amounted to a one-day contract extension and that neither party would take any economic action, there is a dispute about what effect, if any, the standstill agreement had on merit pay.

Klocke testified that the standstill agreement was a verbal agreement for a one-day contract extension. His bargaining notes on March 31 reflect, "KC Proposes extending deadline" (GCx 5) According to Klocke, the parties agreed that the employees would not strike, and ALPA would not lock anyone out. (Tr. 117:23-118:5) Klocke specifically denied that there was any discussion about the suspension of merit pay during the negotiation of the standstill agreement. (Tr. 118:6-9) Klocke's testimony is corroborated by the testimony of Eric Iverson who unequivocally testified that there was no discussion of merit pay on March 31, and by Iverson's notes, which state, "Kelly: we think good idea to spend more time; propose deadline 24 hrs." (Tr. 221:18-223:3; GCx 43, Mar.31, p.4)

Collie agrees with Unit 1's account in that: she reached a verbal agreement with Unit 1 about extending negotiations; that this agreement included that neither side would take any economic action; that the parties discussed informational picketing; and that "things would continue on as they had been." (Tr. 515:4-20) She also agrees that this agreement was only meant to last one day. (Tr. 693:2-7) However, in her version of the standstill agreement, merit

pay was explicitly carved out as a continuing term of employment. (Tr. 515:18-24) On direct examination, Collie was not directly asked what was said in negotiating this standstill agreement. Instead, she describes the "context" of this conversation as:

> That, you know, I primarily talked to Wayne, and I know that Jim Johnson chimed in as well, and that we said we would, you know, both parties agreed to continue to negotiate and that we would not - - you know, everything would stay the same, that there wouldn't be any change except that we wouldn't be processing merit increases. (Tr. 516:9-16)

On cross-examination, when asked to describe exactly what was said when this agreement was reached, Collie testified that her best recollection of the conversation was:

> And I can't remember who said it first, I think we did, that we thought it made sense to extend the time to negotiate and to stop the clock. And we said everything carries over, we won't make any changes. I remember Jim Johnson saying with the exception of merit. And we got up to shake hands. And Wayne said something to me like I'm not going to lose any pay, you know, something that his pay wouldn't be affected. I said no, you're not going to lose any pay. We're not going to change your pay except for merits. (661:25-662:18)

When Jim Johnson testified on direct examination, he was asked to describe the "substance" of the conversations to extend the contract. Jim Johnson testified that:

> …we would stop the clock and extend the bargaining and the negotiating time because we hadn't gotten an agreement and we discussed that here with them. And we agreed that we would extend the bargaining time, and we did it on a handshake because we worked with these people. I knew them, and we did it on the first day on a handshake and then we memorialized it, and I think the second day in writing, and we continued negotiating. And that was the sort of a standstill while we negotiated. (Tr. 435:13-436:7)

After further prodding by Respondent's counsel, Jim Johnson added that:

> Well, I piped in and said as usual there's no pay increases or anything, and everything drops dead and we go forward and negotiate to get a deal just like we did in, I think, 2004 and then it's retroactive to the first of April, which would be the effective date of the contract. (Tr. 436:10-14)

Eric Iverson specifically and directly denied that Collie or Jim Johnson said "except for merit pay" during negotiations on March 31. (Tr. 720:25-721:9) In addition, former Unit 1 negotiator Robert Nichols testified that it was Unit 1's position in 2004 that the contract had

rolled over (and thus, did not expire) because ALPA had failed to give notice of its desire to bargain a new successor agreement. (Tr. 794-796; 664:16-665:2) Consistent with Unit 1's position that the contract had not expired, and in contrast to Jim Johnson's testimony, Nichols specifically denied any agreement with ALPA to discontinue merit pay in negotiating the 2004 contract. (Tr. 798:15-21) Collie testified that she could not recall a written standstill agreement in 2004. (Tr. 692:12-14)

ALPA did not offer any bargaining notes taken by Jim Johnson, Dave Krieger, or Art Luby to corroborate the testimony of Jim Johnson or Collie, even though all were present on March 31. (GCx 43) Additionally, Collie's notes from March 31 – which were not initially produced with her other bargaining notes – make no mention at all of any comments about merit pay. (REx 38) Collie testified that she diligently tried to keep an accurate record of what was said during bargaining, and to the best of her ability, would record anything said during bargaining that she thought was essential. (Tr. 649:20-24; 650:9-11) Although Collie explained that it was difficult for her to talk and write at the same time, (Tr. 649:24-25; 650:11-12), ALPA offered no explanation why she did not record Jim Johnson's alleged statements about merit pay. However, ALPA did produce the bargaining notes of Margarita Lorenzetti. Lorenzetti is ALPA's Director of Finance, whose expertise is in finance. Lorenzetti recorded the negotiations over the standstill agreement in four words: "Extend contract 24 hours" (GCx 71; Tr. 711),[7] which is consistent with the notes of both Klocke and Iverson. In spite of Lorenzetti's financial expertise, there is no mention in her notes about any agreement concerning merit pay.

Collie testified that it was necessary to negotiate that merit pay would 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

[7] This reference is part of the Joint Motion to Correct the Transcript.

March 31, Collie admitted that ALPA paid four employees merit raises after March 31, though she asserted that this was a clerical mistake. (Tr. 275:8-10; 512:14-16; 664:7-15)

According to Respondent's Exhibit 21, there are only three Unit 1 employees with review dates of April 1.

b. The April 1st Standstill Agreement.

On April 1, the parties had still not reached an overall agreement, and there were discussions about a second standstill agreement. It is undisputed that on April 1, Klocke and Collie signed the document identified in the record as General Counsel's Exhibit 28. (Tr. 124:15-23; 509:12-510:13). This document, which is titled "Agreement" provides as follows:

> Pursuant to Unit 1's request, ALPA agrees to extend negotiations for a new UALPAPAE Unit 1 contract to 11:59pm on April 2, 2009. Per previous practice when similar extensions were agreed to, the terms of the new agreement will be effective April 1, 2009. (GCx 28)

Klocke testified in a forthright and deliberate manner that the terms of the standstill agreement were limited to the terms set forth in Exhibit 28, and specifically denied that there was any discussion about merit pay or the merit pay provisions of the collective-bargaining agreement. (Tr. 125:5-10) Corroborating Klocke's testimony, Iverson agreed that there was no discussion about discontinuing merit pay on April 1 in connection with the standstill agreement. (Tr. 223:10-16). Iverson elaborated that he had a clear memory of this conversation, and that Klocke was very particular about the standstill agreement being contingent on the parties reaching a final agreement. (Tr. 223:18-24)

On direct examination, Collie was asked about her "intent" in signing this agreement. Collie answered:

> Our intent was that when we got to an agreement, that the provisions of that agreement would be applied retroactively to April 1st. (Tr. 510:22-511:1)

This explanation is consistent with the testimony of both Klocke and Iverson that *if* a new agreement was reached on April 2, it would be retroactive to April 1. Collie's testimony is further consistent with that of Unit 1's representatives in that this standstill agreement did not refer to merit pay. Collie did not identify the suspension of merit pay as one of ALPA's intentions in reaching this standstill agreement with Unit 1. It is also consistent with Respondent's Exhibit 21, which shows that no employees' anniversary dates fell on April 2.

When asked what the 'Per previous practice" language referred to from ALPA's perspective, Collie answered:

> From my perspective and from my experience, the standstill agreement or the stop-the-clock or whatever it is that you want to call it was to give the benefit of time to the process so that we could continue to negotiate and achieve an agreement and to not make things worse. You know, because, obviously, we're not making progress if we don't have an agreement and we've blown past the deadline. To not make things worse, we gave the Union the assurance that whatever was negotiated would be retroactively applied. So that wasn't another thing that had to be negotiated. (Tr. 511:2-14)

Collie testified that from ALPA's perspective, it was an essential element of the standstill agreement that merit pay not continue beyond March 31. (Tr. 662:19-663:15)

c. The April 2 and April 3 Standstill Agreements.

ALPA and Unit 1 negotiated successor standstill agreements on April 2 and April 3, 2009. (GCx 29 and 30[8]) The April 2 agreement, embodied in an e-mail exchange between Collie and Klocke, provides: "…By mutual agreement, the parties are at a stand still through 11:59 pm on Friday, April 3, 2009. Both parties have agreed to no economic action or declaration of impasse until at least one mediation session has been held. [FMCS mediation] is scheduled to begin on April 3, 2009." (GCx 29) Klocke testified that there was no discussion about the suspension of the merit pay program when this agreement was negotiated, and the parties'

[8] Inadvertently, there are two copies of GCx 30 in the record. The exhibit is a one-page document.

agreement was limited to the terms memorialized in the agreement. (Tr. 125:12-23) There were no employees with anniversary dates on April 3. (REx 21)

When the April 2 standstill agreement expired, ALPA and Unit 1 negotiated another agreement that lasted through April 16. (GCx 30) As with the April 2 agreement, the April 3 standstill was embodied in an e-mail exchange to Klocke initiated by Collie. The April 3 agreement states:

> The purpose of this message is to confirm the status of negotiations. By mutual agreement, the parties are at a stand still through 11:59 pm on Thursday, April 16, 2009. The parties will continue to participate in the mediation process on April 14 through 16, 2009. Both parties have agreed to no economic action or declaration of impasse during this period of time. In addition, the parties have agreed that Unit 1 will discontinue any actions or protest such as informational picketing during the mediation period. Likewise, ALPA will agree to no new job abolishments during the period of mediation. In the event either party is unable to honor these commitments, the mediator will be called prior to taking any action. (GCx 30)

As with the other standstill agreements, Klocke denies that there was any discussion about the suspension of the merit pay program when this agreement was negotiated. (Tr. 126:18-20) Iverson added that ALPA was not pleased with Unit 1's informational picketing, so the parties agreed "they won't do anything, we won't do anything, they won't RIF, we won't have picketing, and have a basic standstill agreement." (Tr. 224:5-10)

I. Negotiations Continue into April, and ALPA Presents its Last and Final Offer.

ALPA and Unit 1 continued negotiations during the first week of April, took a break over the Easter holiday, then resumed bargaining from April 14 to the early morning hours of April 17. (GCx 43; REx 15; Tr. 127:2-6) The parties continued to exchange proposals on several subjects, including Section 11. Collie testified that it was clear to ALPA that job security was

important to Unit 1. (Tr. 617:8-9) The parties' proposals continued to try to develop a staffing model that would guarantee a specified number of Unit 1 positions based on ALPA dues revenue. (Tr. 617:7-618:2; GCx 31, 33; Rex 34, pp.5-35; 38-47) Among other items, the parties did not agree on the numerical employee "floor," whether the dues trigger would be based on annual or quarterly revenue, and the notice period for conducting a RIF. (Tr. 162:7-15; 164:15-165:11; 172:16-173:13)

April 16, 2009 was a "big day" in the parties' negotiations. (Tr. 129:1-2) After a series of bargaining sessions earlier in the day, the parties had a meeting late in the evening. This meeting was not only attended by the regular bargaining committees, but also by ALPA's national officers, General Manager Jalmer Johnson, and Unit 1 president Jay Wells. ALPA presented Unit 1 with what it said was its last, best, and final offer. Each of the pilot officers made a presentation to Unit 1 with their arguments about why Unit 1 should accept ALPA's proposal. When told that this proposal was ALPA's last, best, and final offer, Wells told ALPA that he hoped that the offer had job protection. Wells made a statement to ALPA that he believed Unit 1 had met ALPA's economic needs, but ALPA had not met Unit 1's needs for job protection. (Tr. 129:1-130:3; 166:12-168:4)

The negotiations continued into the early morning hours on April 17, and the parties continued to exchange proposals. (Tr. 129:21-22; 134:11-12) At about 12:30 a.m. on April 17, ALPA amended its offer to include that Unit 1 must withdraw the unfair labor practice charge in Case 18-CA-18999. (Tr. 131:10-132:13; 137:24-138:5; GCx36)

Unit 1 and ALPA resumed contract negotiations on April 30, 2009. In between April 17, and April 30, Collie and Wells negotiated a final standstill agreement by e-mail, which lasted through May 1, 2009. (GCx 58) In the e-mails, Collie described the "essential elements" of the

standstill agreement, but did not list any reference to merit pay. (GCx 58) Wells testified that the purpose of the standstill agreements was to avoid either party from taking economic action. Wells also explained his understanding that the standstill agreements maintained the terms of the contact as the status quo. (Tr. 297:1-25)

J. ALPA Unilaterally Imposes its Last Contract Offer.

On May 7, 2009, ALPA unilaterally imposed its last and final offer made on April 16. (Tr. 137:8-14; GCx 61; CPx 2) All of the terms and conditions of employment contained in that proposal were implemented prospectively beginning on May 7, with the exception of merit pay, which was imposed retroactively to April 1. (Tr. 692:15-693:14)

There is a general agreement that the open issues between the parties on May 7 were job security, retiree healthcare, and red-circle employees, though there is a dispute about the relative significance of each of these issues. (Tr. 56:25-57:10; 137:23-138:6)

Klocke testified that job security was very important to Unit 1 because it goes to the question of whether an employee will continue working at ALPA. Because of this, job security was different from the other "dollars and cents" issues like retiree health. Unit 1 explained this distinction to ALPA by telling them that "health insurance or retiree health doesn't matter if you're not going to have a job." (Tr. 148:1-13) Iverson testified that, "to me the job protection was by far the most outstanding [issue.]" (Tr.224:16-17) Collie admitted that job security was a high-profile issue for Unit 1 at the time of implementation. (Tr. 661:5-8)

Red-circle employees and retiree healthcare were also open issues. Red-circle employees were employees who were at the top of their pay scale, and therefore, received their merit pay as

a lump-sum payment, rather than as an increase to their base salaries. If Unit 1 agreed to ALPA's proposal to a two-year wage freeze, the red-circle employees would actually receive a pay cut. Consequently, Unit 1 was seeking ways to ensure parity between red-circle employees and the rest of the unit. (Tr. 138:7-22; 225:1-17; 430:4-14; 624:4-8) Iverson explained that the red-circle pay only affected a few unit employees, and was not a particularly major issue. Rather, it was just an open issue at the time of implementation. (Tr. 224:22-24; 226:8-10, 15-17; 260:10-12) Collie explained that red-circle pay seemed like a big issue on May 7, though she admitted that during negotiations on April 17 someone made a comment that red circle pay wouldn't kill the deal, and she recorded this comment in her bargaining notes. (Tr. 657:23-24; 659:2-660:5; REx 15 p. ALPA 012378)

Retiree health was another open issue on May 7.[9] (Tr. 225:18-21) Collie testified that retiree health was the most significant issue from ALPA's perspective.[10] ALPA was seeking changes to the retiree health plan that were "not insignificant." The three major items under discussion were premium increases, plan design, and changing plan eligibility. (Tr. 621:5-13) Although the parties had not reached an agreement on retiree health at the time ALPA implemented its final offer, both ALPA and Unit 1 agreed that Unit 1 did not represent current retirees. In fact, Collie recorded in her bargaining notes that Johnson told Unit 1 that ALPA could do what it wanted at its peril. (Tr.624:9-10; 660:7-661:4; REx 15, p. ALPA 012361)

[9] Although Collie claimed that active employees' healthcare was also an issue, Jim Johnson and Eric Iverson both testified that the parties had an agreement, or were close to an agreement at the time of imposition. (Tr. 225:22-25; 226:18-227:4; 432:12-15) Additionally, active employee healthcare is not listed as an open issue by ALPA in GCx 68 or CPx 2.

[10] Collie claimed that the parties had "punted" on retiree health a number of times, which eventually resulted in an arbitration decision in 2005. Collie initially characterized the arbitrator's decision as, "look, your contract is about up, renegotiate." Later, on cross-examination, she admitted that the arbitration was last-offer arbitration, and the arbitrator agreed with Unit 1's proposal. (Tr. 619:12-25; 691:21-692:11)

On May 22, 2009, Unit 1 filed the charge in Case 05-CA-35014 alleging that ALPA unilaterally changed terms and conditions of employment without first bargaining to a lawful good-faith impasse, which is precluded by the unfair labor practices alleged in Case 05-CA-34837. (GCx 1-C, 1-EE ¶ 1(c))

K. Unit 1 Files a Grievance Over ALPA's Failure to Pay Merit Increases.

On May 18, 2009, Unit 1 filed a grievance over ALPA's failure to pay merit increases during the period from April 1 to May 7, 2009. Senior Attorney Jim Lobsenz, who at that time was chairman of the Unit 1 grievance committee, served as Unit 1's primary representative in processing this grievance. (Tr. 261:11-16; 262:2-22; GCx 48)

Between late May and early June 2009, Lobsenz and Collie had approximately 20 individual meetings related to this grievance because ALPA insisted on a separate grievance meeting for each affected employee. (Tr. 270:2-15) In general, the discussions in each of these meetings were substantially the same. (Tr. 270:16-23). Lobsenz testified without contradiction that in one of these grievance meetings (Marian Tashjian's), Collie implied that ALPA and Unit 1 had an agreement that there would be no merit pay increases during the period from April 1 to May 7. When questioned by Lobsenz, Collie held up a document purporting to reflect this agreement between ALPA and Unit 1, but she would not show it to Lobsenz. (Tr. 272:2-10) It was not until October 3, 2009, that Collie identified the April 1 standstill agreement (GCx 28) as the document she had held up in Tashjian's grievance meeting. (Tr. 273:9-274:1; GCx 52, 53)

Unit 1's grievance was denied in a combined Step 1/Step 2 decision by Collie, and at Step 3 by Jalmer Johnson. (GCx 49, 51) In his Step 3 decision, Jalmer Johnson cites the reasons for denying the grievance, including: ALPA had no obligation to provide merit increases beyond

the expiration of the collective-bargaining agreement, and the standstill agreement. (GCx 51) At the time of trial, Unit 1's grievance is awaiting arbitration.[11] (Tr. 274:18-19)

On September 10, 2009, Unit 1 filed the charge in Case 05-CA-35244 alleging that ALPA unilaterally changed employees' terms and conditions of employment without first bargaining to a lawful good-faith impasse by on or about April 1, 2009, failed and refused to provide employees represented by Unit 1 with the merit pay increases provided for in the parties' collective-bargaining agreement. (GCx 1-G; 1-EE ¶ 1(e))

L. Respondent Lays Off Elaine Grittner.

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." (GCx 44) Grittner was a benefits specialist employed in ALPA's Minneapolis office. Her primary job was to provide information and advice on the Northwest Airlines benefits plans. (Tr. 254:11-17; 628:5-12) Grittner remained employed after the Delta/Northwest merger until the open enrollment occurred for the Northwest pilots to transition to the Delta benefit plans. (Tr. 628:13-629:1)

In response to Collie's letter, Unit 1 president Don McClure sent a letter to 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)

[11] The grievance concerned employees who did not receive merit pay between the contract's March 31 expiration date and the May 7 imposition date. Collie testified that employees whose anniversary dates fell on or after May 7 did not receive merit increases under the contract terms imposed by ALPA. (Tr. 512:8-16)

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)

Klocke and 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, 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)

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) The record shows that during these meetings with ALPA, Unit 1 tried to model a position for Grittner. The Union was asking if there was a way to combine other work to keep Grittner employed in Minneapolis, or to explore telecommuting possibilities. ALPA informed Unit 1 that it had already discussed telecommuting with Grittner, but it became an issue with her home utilities. Woody challenged Collie and said that that discussion should have been with Unit 1, and not Grittner. 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, 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; 627:20-628:4)

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) Collie claims that at the end of the day on December 15, Woody said something to the effect of you can check the bargaining box as unsuccessful. (Tr. 630:19-631:2) The record does not show that ALPA ever submitted any proposals regarding Grittner, other than its proposal to lay her off.

On November 23, 2009, Unit 1 filed the charge in Case 05-CA-35419 alleging that ALPA violated Section 8(a)(1) and (5) of the Act when it announced the layoff of a bargaining-unit employee without first offering to bargain over that decision or its effects, and in response to a request for bargaining from Unit 1, refused to bargain over either the layoff decision or its effects. (GCx 1-K; 1-EE ¶ 1(f))

M. Prior Layoffs.

1. 1985 Layoffs.

Very little evidence was presented concerning layoffs in 1985. Jim Johnson testified that there was a layoff in 1985, but he did not say how many employees were laid off or the specific

reason for the layoff. He attributed the layoff to "financial stress." (Tr. 370:4-14) Jim Johnson claimed that ALPA did not bargain with Unit 1 over this lay off, and that Unit 1 took the position that it was not involved in the RIF because it was up to management to hire and fire. (Tr. 371:2-7)

However, Jim Johnson was not a Unit 1 officer in 1985 (468:12-13). He did not recall who notified him of the 1985 RIF, or if he was directly notified by ALPA. (Tr. 468:23-469:5) Likewise, he did not know when Unit 1 was notified of the RIF by ALPA, how far in advance of the RIF Unit 1 was notified, or what, if anything, Unit 1 representatives said to ALPA when they were notified of the layoff. (Tr. 469:8-22).

Jim Johnson is not aware of anything in writing in which Unit 1 took the position that it was not involved in the 1985 RIFs, and he does not know if this position was ever communicated to ALPA at all. (Tr. 470:7-15)

2. 1994 Layoff.

Unit 1 and ALPA conducted negotiations in 1994 concerning a budget deficit in 1995. Pat Brennaman served on this committee for Unit 1. According to Brennaman, ALPA was seeking the assistance of Unit 1 and Unit 2 to find cost savings in the unions' agreements to fill its budget deficit. (Tr. 774:1-10)

On September 28, 1994, ALPA met with representatives from Unit 1 and Unit 2 to discuss the 1995 budget.(REx 5) Brennaman testified that it was Unit 1's position at the time that ALPA was overestimating its budget shortfall, and that changes to the contract or conducting a RIF were premature. (Tr. 773-775) Unit 1 presented suggestions to help ALPA cut costs. Among the cost-saving proposals that Unit 1 made were for voluntary separations. ALPA developed two package options, Package A and Package B, which incorporated some of Unit 1's suggestions,

but also included a wage freeze. (Tr. 777-780; REx 5) Collie's notes from this meeting with Unit 1 reflect that then-General Manager Howard Pike told Unit 1 that ALPA couldn't guarantee any RIFS even if there was a wage freeze. (Tr. 764-765; CPx 5) In a memo distributing Packages A and B to members of ALPA's management, then-Manager of Human Resources Jan Briel cautioned, "Please remember that negotiations must be conducted through collective-bargaining, and it is therefore important that management employees refrain from affecting the process." (GCx 74)

Package A and Package B would have required Unit 1 to re-open the contract. Unit 1 took a vote, and decided not to accept either Package A or Package B. ALPA then conducted a RIF. (Tr. 784-786) Brennaman testified, however, that as the result of ALPA adopting some of Unit 1's suggestions, the number of RIFs was reduced from 34 to 20. (Tr. 780)

3. 2000-2004 Layoffs.

ALPA presented evidence that there were layoffs during the term of the 2000-2004 contract, and Jim Johnson claims that Unit 1 did not demand to bargain over these layoffs. (Tr. 410:17-21). No evidence was presented about the circumstances surrounding any of the layoffs that occurred during this four-year period, with the exception of the print shop, *infra* .

4. Print Shop Layoffs.

In 2004, ALPA closed its in-house print shop. Prior to closing the print shop, ALPA explored the idea of selling the print shop to a company called Linemark Printing. (Tr. 744, GCx 73) As part of the sale agreement, the current print shop employees would become employees of Linemark Printing. To complete this transaction, ALPA needed the agreement of Unit 1 and Unit 2 that the transfer of the print shop jobs to Linemark would not be considered a "job

abolishment" under the terms of the contract. The purpose of this agreement was to avoid triggering the contractual severance benefits. (Tr. 746:20-747:3; GCx 73) This agreement was reached during negotiations between ALPA, Unit 1, and Unit 2 on December 15, 2003. (GCx 72)

The members of Unit 1 and Unit 2 voted on the proposed agreement, and rejected the offer. (GCx 73) As a result, the print shop employees were laid off, received severance benefits, and ALPA closed the print shop. (Tr. 747; 4-15; 769-770; GCx 73)

5. 2008 Layoffs.

Primarily as the result of a decertification election involving pilots at US Airways, approximately 15 Unit 1 employees were laid off in 2008. (Tr. 316:14-17) Jay Wells was the Unit 1 president at the time of these layoffs, and he described them as "unprecedented." (Tr. 316:11-13; 319:15-16)

In the spring of 2008, Jalmer Johnson and Collie generated a list of proposed staff cuts for the national officers' review. Jalmer Johnson denied that an employee's job performance was a factor that he and Collie considered in deciding to put an employee on this list. (Tr. 738:15-739:1) However, Collie admitted that an employee's job performance was a factor in whether an employee was placed on the list. (Tr. 752-755; 761-764) 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 set aside two full days for negotiations with Unit 1. On a calendar she prepared, she noted on May 10 and 11: "UNION NEGS IF NECESSARY" Collie eventually admitted that "NEGS" was an abbreviation for "negotiations," though she explained that she used this terminology because it was too cumbersome to write "meet and confer." (Tr. 675-676) However,

Collie's *bargaining* notes from 2009 begin with the heading "U1 NEGS" on January 5. (REx 15) Regardless of what Collie actually meant in 2008, she testified that if Unit 1 would have demanded to bargain over the layoffs, ALPA would have only met and discussed them. (Tr. 705-706)

When the layoffs were announced in 2008, Unit 1 was provided only with the number of positions affected by the RIF and the aggregate salary savings. (Tr. 316:25-317:11; REx 32) ALPA admits that Unit 1, on more than one occasion asked for the names and positions of the employees subject to the RIF, and that ALPA refused to furnish this information to the Union. (Tr. 317; 635-636; 671-672; REx 33; GCx 69) When Wells asked for the positions subject to a RIF over the summer of 2008 he informed Collie that he offered to keep the information confidential. Collie responded said she could not provide this information because it might change; however, there is no evidence that Collie told Wells that Unit 1 was not entitled to the information because it was ALPA's position that there was no obligation to bargain over the RIFs. (GCx 69)

Wells testified that after quite a bit of internal deliberation, Unit 1 did not demand to bargain over the RIFs in 2008. On or about June 10, 2008, Wells had a conversation with Collie in which the 2008 RIFs were discussed. He told her that there was widespread dissatisfaction with the manner in which the layoffs were conducted in June 2008, and in particular, there was disappointment that voluntary buyouts or similar mechanisms were not used, and that Unit 1 was considering whether to demand bargaining over future RIFs. (Tr. 318:7-11; 320-321) Collie was not asked to deny this conversation during her testimony.

6. Unit 1 Negotiates Other Job Abolishments.

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. Although some of these settlement agreements arise after a grievance has been filed, not every settlement agreement involved a grievance. Collie also admitted that performance is a factor in employee layoffs. 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).

III. ARGUMENT

A. Respondent Has Not Shown a Clear and Unmistakable Waiver.

There is no dispute that Respondent failed to bargain with Unit 1 concerning the layoffs in Herndon, Minneapolis, and Houston in early 2009 – Respondent admits it. Similarly, there is no dispute that these layoffs are a mandatory subject of bargaining, as Respondent is no longer asserting any defense under *First National Maintenance Corp v. NLRB*, 452 U.S. 666 (1981) or *Dubuque Packing Company*, 303 NLRB 386 (1991). Respondent's only defense, therefore, is to establish that Unit 1 clearly and unmistakably waived its right to bargain over these layoffs, which is a burden Respondent cannot meet.

Waiver is an affirmative defense that must be pled and proven by Respondent. *Kingsbury, Inc.* 355 NLRB No. 195 at 17 (2010); *Allied Signal*, 330 NLRB 1216, 1228 (2000);

Silver State Disposal Service, 326 NLRB 84, 87 (1998). A waiver of statutory rights will not be inferred from general contract provisions, but must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), meaning the subject was "fully discussed and consciously explored," and that Unit 1 "consciously yielded." *Georgia Power Co.*, 325 NLRB 420, 420 (1998); *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1983). This high standard "requires bargaining parties to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). A waiver may be found in explicit contract language, or through the conduct of the parties, including bargaining history or past practice. *Johnson-Bateman Co.*, 295 NLRB 180, 189-190 (1989); *United Technologies Corp.*, 274 NLRB 504, 507 (1985).

1. There is No Waiver of the Right to Bargain Over Layoffs in the Contract.

Respondent has essentially conceded that there is no express bargaining waiver within the four corners of the collective-bargaining agreement. The parties' collective-bargaining agreement contains no management-rights clause and no zipper clause. Moreover, there is no other provision that explicitly sets forth procedures such as the circumstances under which Respondent may conduct a layoff, or how employees will be selected for layoff.

The closest the contract comes to discussing layoffs is in Section 11, "Recall/Rehire and Severance Pay." That section provides that, "[i]n the event a Staff Employee's position is abolished and ALPA is unable to provide work of comparable pay, the Staff Employee shall receive severance pay…." Although Section 11 discusses some of the benefits an employee

would be entitled to *if* he were laid off, it does not address subjects such as *why* there is a layoff in the first place, or *how* the employee is selected.

As found by the judge, the facts presented in *Teamsters Local 71*, 331 NLRB 152 (2000) are remarkably similar to those of this case, and serve as an instructive guide. In that case, a union acting as an employer was found to have unlawfully laid off an employee in violation of Section 8(a)(1) and (5) of the Act. The judge and the Board rejected the respondent's argument that it was privileged to act unilaterally because of contract language that stated, "[w]here there is a reduction in force, the junior most employee(s) in the office clerical classifications will be laid off first." The Board stated, "[a]pplying the clear and unmistakable waiver standard here, we find, like the judge, that the contractual language at issue does not expressly give the [r]espondent the right to layoff employees unilaterally. Rather the contract language merely provides for the succession of layoffs and the manner in which those layoffs will be implemented should they become necessary…Consequently, the [r]espondent has an obligation to bargain with the [u]nion over that subject." 331 NLRB at 152. See also, *New York Mirror*, 151 NLRB 834, 840 (1965) ("…the severance and termination provisions are at best equivocal. They contain no specific reference to a right by the [r]espondent to terminate operations without prior notice or consultation with the [u]nions and on their face are entirely consistent with the reservation by the [u]nions of such right.")

The similarities of *Teamsters Local 71* and *New York Mirror* to this case are striking, and these cases demonstrate that contract language such as Section 11 does not satisfy the well-established standard requiring that waivers of statutory rights much be clear and unmistakable. Even more remarkable is that Collie - ALPA's chief negotiator - admits that there is no waiver contained in the collective-bargaining agreement concerning layoffs.

In eschewing the conclusions of these cases, ALPA claims that *California Pacific Medical Center*, 337 NLRB 910 (2002) is "directly on point." (Exceptions Brief, p.23) However, *California Pacific Medical Center* is readily distinguishable because in that case the parties' collective-bargaining agreement included an express waiver that allowed the employer to make staffing decisions. That contact provided, "…the Medical Center has the right to determine its staffing (including the number of jobs, the hours assigned to such jobs, and the changes to be made, if any)…" 337 NLRB at 912. There is nothing in ALPA's contract with Unit 1 that comes close to providing ALPA with the level of discretion the employer had in *California Pacific Medical Center*, and the Board's decision in that case provides no relief for ALPA.

Because there is no waiver on the face of the collective-bargaining agreement, the only ways Respondent can show that Unit 1 gave up its right to bargain over layoffs are through bargaining history or an established past practice. As discussed below, this is a showing that Respondent will not be able to make.

2. The Parties' Bargaining History Does Not Show That There Was a Waiver.

The parties' bargaining history does not demonstrate that there has been a clear and unmistakable waiver regarding layoffs. To the contrary, it shows that on several occasions the parties have bargained on this subject, and never came to mutually-acceptable terms.

ALPA argues that when Unit 1 bargained for enhanced severance benefits over the years, the Union did so because it recognized that it did not have the right to bargain over layoffs. However, the only foundation for this argument is speculation, and it exists solely in the mind of ALPA. During the course of the hearing, ALPA has produced evidence dating back to 1979. And, after producing over 30 years of bargaining history, ALPA has produced neither a single

document, nor a single statement showing that Unit 1 *ever* bargained for enhanced severance benefits in exchange for waiving its right to bargain over layoffs. Instead, ALPA relies on layers of inference.[12]

Decisions to conduct economically-motivated layoffs are a mandatory subject of bargaining. *Dubuque Packing Co.*, 303 NLRB at 388; *First National Maintenance Corp.*, 452 U.S. at 667. Thus, ALPA must concede that Unit 1 inherently has the right to bargain about economic layoffs absent a clear and unmistakable waiver. ALPA must also concede – even if its waiver argument is ultimately adopted – that at some point between the Union's certification in 1951 and the present time, Unit 1 had the right to bargain over economic layoffs; to argue that there has been a waiver implicitly admits that there was possession in the first place.

ALPA never once during the hearing made any attempt to identify with *specificity* when or how the waiver occurred. For a waiver that is legally required to be "clear" and "unmistakable," this should be a straightforward task. Was it in 2008? Then why introduce evidence from 2004? Was it in 2000? Then why introduce evidence from 1994? Was it in 1985? Then why introduce evidence from 1979? The answer, of course, is that ALPA can't identify *when* or *how* this waiver occurred; it just argues that it did. Unfortunately for ALPA, the law requires more.

There is no evidence in the record that Unit 1 bargained for any provision in Section 11 in exchange for a waiver of the right to bargain over layoffs. In fact, Unit 1's negotiators specifically deny that such an exchange was made, and ALPA has not presented a single line of testimony challenging these denials. In fact, the testimony of ALPA's witnesses supports that

[12] Although ALPA makes much of the fact that Unit 1's bargaining demand occurred "mid-contract," the evidence and argument here show that nothing in the parties' collective-bargaining agreement or bargaining history waived Unit 1's right to demand bargaining over layoffs. Therefore, the contract does not control when Unit 1 can demand bargaining over layoffs.

there is no evidence of a waiver. Jim Johnson, who began representing ALPA in contract negotiations in 1989 or 1990, testified that no one from Unit 1 – in all of the negotiations he ever participated in – ever explicitly said that they were waiving their right to bargain about layoffs. (Tr. 373:18-374:4; 479:22-480:3) Similarly, Jalmer Johnson could not recall any written document in which Unit 1 waives its right to bargain over layoffs. (Tr. 748:23-749:1) Although Collie testified that in 2004 negotiations Unit 1 stated they wanted to make layoffs more costly for ALPA, they never said they were waiving their right to bargain over layoffs. (Tr. 665:3-8) Moreover, if ALPA's argument is adopted, it would have no logical limit: there is no more evidence in the record that Unit 1 waived its right to bargain over layoffs in exchange for job-placement services, for example, than any other term in the contract – ALPA could just as easily make the same argument for moving allowances or union security.

As an example, ALPA made great efforts to show that over the years, Unit 1 lobbied for seniority-based layoff provisions in the contract, which ALPA did not agree with, and which ultimately were not included in the collective-bargaining agreement. (See generally, testimony of Jim Johnson discussing Respondent Exhibit 9, Tr. 390-404) Presumably, this evidence is designed to show that because Unit 1 failed to bargain a seniority-based layoff system into the contract, ALPA was free to pick and choose which employees it wanted to lay off.

But this type of thinking is completely backwards under the Act. *Unit 1 already has the right to bargain about how employees will be selected for layoff*, whether by seniority or any other method. Had Unit 1 successfully bargained for a seniority layoff system, *then* it would have waived the right to bargain about selecting employees using other means. When mandatory subjects of bargaining are at issue, the whole purpose of codifying terms into a collective-bargaining agreement isn't to *establish* rights, but to establish *waivers* of rights. If there was no

collective-bargaining agreement at all – if Unit 1 was a newly certified union – it would have the right, at each and every layoff, to bargain for the manner of selection. One time it may be seniority, and the next it may be by job classification, and the time after that it may be by the number of hours worked, or even not to take a position at all. But, by agreeing to a methodology in a collective-bargaining agreement, Unit 1 waives its right to select a new method each and every time for the remainder of the contract term. Here, as ALPA has pointed out – the parties never reached an agreement on how employees will be selected for layoff (or the layoff decision, for that matter.) But rather than recognize that Unit 1 still retains these rights, ALPA turns the situation on its head. In discussing Unit 1's 2009 demand to bargain over the Minneapolis layoffs, Jim Johnson described ALPA's backward position perfectly when he testified that, "these layoffs were taking place under the '04 contract…that there was no provision for that. You get the severance pay…[w]e took the legal position that we didn't have to bargain over those [layoffs] that if you wanted to that in the next contract you could do that." (Tr. 422:11-19)

Rather than showing a waiver, the parties' bargaining history shows that Unit 1 refused to waive its right to bargain over layoffs. Over the years, ALPA has, on several occasions, sought to add a management rights clause to the Unit 1 agreement, and each time, Unit 1 has rejected it. Unit 1 negotiator Pat Brennaman went so far as to describe ALPA's 1995-1996 management rights proposal as "offensive" to Unit 1. When ALPA claimed that it inherently had these management rights whether or not it was memorialized in the contract, it is undisputed that Brennaman replied that "you may <u>think</u> you have the right to make a decision without consulting

us." Similarly, ALPA's efforts to secure a management rights clause in 1991-1992 negotiations were rejected by Unit 1.[13]

Beyond this documentary evidence, several Unit 1 negotiators, covering decades of bargaining history, testified without contradiction that Unit 1 never offered a waiver of its right to bargain over layoffs. In negotiations for the 1996 agreement, Pat Brennaman testified that there was never any discussion about Unit 1 waiving its right to bargain over layoffs, that no one from Unit 1 ever said in his presence that they were waiving the right to bargain about layoffs, and to Brennaman's knowledge, no one from Unit 1 ever considered such a waiver. In addition, he specifically denied that Unit 1 bargained away its right to bargain over layoffs in exchange for any improvements or additions to Section 11.

In the negotiations for the 2000 and 2004 agreements, Unit 1 negotiator Bob Nichols testified that Unit 1 never waived its right to bargain over layoffs, and no such waiver was ever discussed. When asked if Unit 1's effort to make RIFs more costly was a concession that Unit 1 didn't have the right to bargain over layoffs, Nichols firmly answered, "Absolutely not." He likewise denied that a layoff waiver was the reason Unit 1 was seeking a seniority methodology for layoffs. Not only was Nichols' testimony on this subject deliberate and forthright, his professional experience demonstrates that he knows what he's talking about. Nichols has been an attorney since 1967, and briefly worked for the Board. He then worked in a union-side law firm for nearly three decades, and had a "fairly active" NLRB practice. Moreover, he represented the charging party union in *Dubuque Packing* - a seminal case on the duty to bargain.

Eric Iverson and Kelly Collie testified about their experiences during the 2008 negotiations. Collie said that Unit 1 put a "tremendous focus" on job security, including recall

[13] In addition to its demand to bargain over layoffs, Unit 1's repeated rejection of ALPA's management rights proposals and assertions of managerial discretion make this case distinguishable from *Speidel Corp.* 120 NLRB 733 (1958) and *Manitowoc Ice, Inc.*, 344 NLRB 1222 (2005) on which Respondent relies.

rights, increases to severance, and outplacement services. However, Iverson explained that Unit 1 never exchanged its right to bargain over layoffs in exchange for improvements to Section 11. Specifically, he denied that Unit 1 gave up the right to bargain over layoffs in exchange for Section 11 benefits such as resume writing, outplacement services, prior service credit, relocation benefits, or anything else.

Finally, an examination of the Unit 2 contract is instructive. Both Collie and Jim Johnson participated in the negotiation of this agreement – the same management officials who participated in crafting the Unit 1 contract. But unlike the Unit 1 contract, the Unit 2 agreement contains a management rights clause, which specifically gives ALPA the right to lay off employees. Moreover, the Unit 2 agreement has a section titled "Reduction in Force" which provides, "Whenever *ALPA determines* that it is necessary to lay off one (1) or more employees in the bargaining unit…" (emphasis added) This language is far different from that in the Unit 1 agreement, and demonstrates that when ALPA wants to negotiate a waiver regarding layoffs, it knows how to do it.

3. ALPA Has Not Demonstrated a Bargaining Waiver Through Evidence of Past Practice.

ALPA has not shown that Unit 1 clearly and unmistakably waived its right to bargain about layoffs in 2009 through evidence of past practice. If anything, the evidence of past layoffs is consistent with the parties' bargaining history – that Unit 1 has the option of electing to bargain about layoffs each and every time the issue arises. It is well-established that [a] union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain of such changes." *Owens-Corning Fiberglas*, 282 NLRB 609 (1987). See also *Caterpillar, Inc.*, 355

NLRB No. 91 slip. op. at 3 (2010), *enfd. Caterpillar v. NLRB*, Case #10-1269 unpublished opinion (DC Cir. May 31, 2011); *E.R. Steubner, Inc.*, 313 NLRB 459, 459 (1993).

Jim Johnson's testimony concerning the 1985 layoff is so vague that it cannot possibly demonstrate a clear and unmistakable waiver 24 years later in 2009. Jim Johnson's assertion that Unit 1 took no action regarding these RIFs carries little weight in determining the legal effect on Unit 1's rights. Johnson was not a Unit 1 officer, and either could not recall or had no knowledge of the discussions between Unit 1 and ALPA during this time.

The events of the 1994 layoff show that Unit 1 engaged in discussions about ALPA's budget shortfall for 1995. During these discussions, Unit 1 told ALPA that it was overestimating the budget shortfall, and it was premature to seek cost-saving measures in the contract. Instead, Unit 1 made suggestions to help ALPA reduce its costs, including a proposal that ALPA offer employees the option to voluntarily separate. Ultimately, the proposals that ALPA presented to Unit 1 for its consideration incorporated some of Unit 1's suggestions, but still asked employees to accept a wage freeze. Given that Unit 1 had been told by ALPA that a wage freeze would not guarantee that there would be no RIFs, it is understandable that the employees voted to reject ALPA's proposals to reopen the contract. Although the result of the employees' vote was a layoff, because ALPA had incorporated some of Unit 1's cost-saving suggestions, the effect of the RIF was much smaller.

ALPA's evidence of layoffs in the 2000-2004 time frame is so devoid of context that they shed no light on whether Unit 1 has waived any statutory rights.

The 2004 layoffs in ALPA's print shop are interesting in that the parties engaged in negotiations involving job abolishments where it is likely that ALPA would not have had a legal obligation to bargain in any event. The evidence shows that ALPA was completely closing its

print shop, and under the holding of *First National Maintenance*, ALPA would likely not have had a legal duty to bargain about this layoff decision. Nonetheless, the documentary evidence from that time shows that during discussions between Unit 1 and ALPA, ALPA needed Unit 1's agreement to not classify employee layoffs as job abolishments. Although Unit 1 ultimately insisted that the affected employees should receive severance benefits, the important point about these negotiations remains that ALPA needed Unit 1's consent in a situation involving job abolishments, which certainly does not show that Unit 1 waived its statutory right to bargain over layoffs.

The 2008 layoffs do not show that Unit 1 waived its right to bargain over layoffs in 2009. In fact, the record evidence suggests that these layoffs were a fait accompli. 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). What we know about these layoffs is that ALPA's officers made a "final decision" to conduct these layoffs before Unit 1 was informed. In addition, Collie claimed during her testimony that had Unit 1 demanded to bargain over these layoffs, ALPA would have refused; instead ALPA would have agreed only to "meet and confer." Finally, it is undisputed that ALPA refused to provide Unit 1 with information about these layoffs when the Union asked for it, even after Unit 1 offered to keep the information confidential.

Given these facts, it is inexplicable how ALPA could use the 2008 layoffs to show that Unit 1 waived its right to bargain in 2009. Collie admitted that ALPA would have refused to bargain over these layoffs, and that ALPA refused to provide Unit 1 with information. Now ALPA is seeking to parlay what would have been its own refusal to bargain into a waiver of Unit 1's rights? Rather than generating a bargaining waiver for 2009, the 2008 layoffs put ALPA *on*

notice that Unit 1 was considering whether to demand bargaining should layoffs occur in the future.

Finally, there is evidence that over the years, some employees have had their separations from ALPA classified as "job abolishments" following negotiations between Unit 1 and ALPA. Collie admits that these negotiations resulted in written settlements that were negotiated with and signed by Unit 1. Although Collie tried to distinguish these individual settlement agreements from other job abolishments, she admitted that both received severance benefits under Section 11. She also admitted that ALPA had the right to discipline employees for poor performance, but instead chose to negotiate with Unit 1 over job abolishments.

After looking at the history of layoffs at ALPA, the only thing visible is a hazy picture. There is far too little detail about these past layoffs to conclude that Unit 1 clearly and unmistakably waived its right to bargain about layoffs in 2009. In fact, this history suggests the opposite – that Unit 1 was giving ALPA an early warning that it should expect *bargaining* in 2009, not a waiver.

B. Respondent Unlawfully Refused to Provide Unit 1 With Information Necessary to Bargain About Layoffs and Job Security.

It is undisputed that ALPA failed to furnish Unit 1 with information it requested concerning its unilateral layoffs. In fact, Respondent's central defense is that because it did not have an obligation to bargain about the layoffs, it had no obligation to provide information related to those layoffs. As explained above, it is the General Counsel's view that ALPA has not demonstrated any waiver that would excuse its admitted failure to bargain with Unit 1 over the layoffs in Herndon, Minneapolis, and Houston, and consequently, ALPA's failure to provide information about those layoffs was unlawful.

An employer must provide a union that is the collective-bargaining representative of its employees with information that is necessary and relevant for the proper performance of the union's duties in representing the bargaining-unit employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The test for relevance is a liberal, "discovery-type standard." *Id*. at 437. Information pertaining to the bargaining unit is presumptively relevant and no particular showing of relevance is required. *Aerospace Corp.*, 314 NLRB 100, 103 (1994); *Pennsylvania Power and Light Company*, 301 NLRB 1104, 1105 (1991). Other than its claim that it has no obligation to bargain over layoffs, ALPA has never argued that the information requested by Unit 1 is not relevant, and there is no evidence that such a relevancy objection was ever made by ALPA to Unit 1 in response to any of Unit 1's information requests.

Because ALPA didn't make any relevancy objections at the table to Unit 1, it should not be allowed to craft a *post hoc* relevancy objection now.[14] But even if the Board should entertain ALPA's relevancy argument, this claim should be rejected. First, as discussed above, information about the bargaining unit is presumptively relevant, without any need for a particularized showing. Second, Unit 1 *did* explain the relevancy of the names and positions of the employees selected for layoff: the Union needed this information to evaluate the situation for itself and craft its own bargaining proposals.[15]

Ironically, in explaining how ALPA made its layoff decisions, it provides the very basis for why this information was relevant to Unit 1. As ALPA explained: "…the answer was simply

[14] By making its purported offer to release the names to Unit 1 upon a promise of confidentiality, ALPA conceded that the names were relevant information. Otherwise, there would have be no need for ALPA to engage in discussions about keeping the names confidential.

[15] ALPA argues that it would have been "sensible" for Unit 1 to discuss the layoffs with all of the Minneapolis employees, instead of the six or seven who were likely to be subject to the RIF. (Brief at p. 41, fn30) Not only is ALPA attempting to arrogate to itself a judgment about how Unit 1 should best represent its members and the information it thinks Unit 1 needs, but also suggests that it was more "sensible" for Unit 1 to talk to double the number of employees expected to be subject to the RIF (12 vs. 6-7). Moreover, ALPA's argument misses the point of the relevancy standard. The requested information does not have to be useful in and of itself (though it was in this case); the discovery-type standard requires only that the information could lead to relevant information.

that ALPA would look at the *totality of each individual's circumstances* and apply its discretion…" (ALPA Brief, p.42) So, ALPA wants to claim that its layoff decisions are based on "the totality of each individual employee's circumstances," but that that *same information* about individual employees is not relevant?

ALPA has also asserted at various times that the names or positions of the employees selected for layoff are 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. 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." 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. But, in making this judgment, ALPA has deprived Unit 1 of the ability to put forth any suggestions that might save the employee's job because the Union doesn't have enough information to craft proposals.

In any event, ALPA's confidentiality claim is illusory. Although Jim Johnson testified that ALPA declined to give the employees' names to Unit 1 because Unit 1 refused to keep the names confidential, the record evidence suggests that even if Unit 1 had made such a confidentiality pledge, the information would not have been provided anyway. As demonstrated in General Counsel's Exhibit 69, in 2008, Wells asked for Collie to identify the positions that would be RIF'd over the summer of 2008, and he offered to keep this information confidential. Nonetheless, ALPA still refused to furnish the information. ALPA has presented no evidence or offered any explanation upon which the judge or the Board could reasonably conclude that ALPA would have provided the names in 2009, when it refused to do so in 2008.

ALPA has also claimed that it didn't provide Unit 1 with the requested information because it either did not exist, or because the information might change. Both of these claims should be rejected. During questioning by Respondent's counsel, Collie testified that there was no document that set forth a list of criteria that were applied by ALPA to determine which individuals or positions would be abolished. But, the record makes clear that there *were* criteria used to select employees and positions for abolishment; ALPA has never claimed that employees were simply selected at random.

ALPA's argument that it could not give the names and positions selected for layoff to Unit 1 because the information might change is likewise without merit, primarily because much of the information Unit 1 requested was not likely to change. For example, on January 7, 2009, Unit 1 asked for the names of the five employees scheduled to be laid off in Herndon beginning on the following day. ALPA had not only selected the number of positions to be eliminated, but also the total dollar amount of the savings. Moreover, as Collie testified that she had the authority to lay off these employees as early as December 2008, there is no evidence that the identities of the five Herndon employees was likely to change between the afternoon of January 7 to the morning of January 8. Even if the names were likely to change, ALPA did not provide this reason to Unit 1 for withholding the names. Instead, Collie said she would not provide this information because it had not been provided in the past. Even if Collie's assertion about Respondent's past practice is true, the failure to provide information in the past does not constitute a continuing waiver. *Owens-Corning Fiberglas*, 282 NLRB 609 (1987). As another example, when Unit 1 asked ALPA on January 13, 2009, to furnish a detailed explanation of how each Unit 1 employee laid off to date was selected, that information was also not going to change because it related to past events.

Additionally, the evidence shows that in December 2008, Jalmer Johnson and Collie presented ALPA's Executive Council with a list of names and positions proposed for layoff, and the Executive Council approved this list. Jalmer Johnson testified that with regard to a similar list generated for layoffs in 2008, that once the national officers approved the list, regardless of when it occurred, the officers' decision was final. (Tr. 363:5-8) Further, Collie testified that the layoffs in 2009 followed the same process as in 2008. Therefore, it is very likely that once the layoff decision was made at the Executive Council meeting in December 2008, the identities and

positions of those selected for layoff were *not* likely to change. As stated above, the fact that Collie was given the option of executing the layoffs immediately, or waiting until after the holidays, only serves to further undercut ALPA's claim of potential change.

Finally, ALPA should be estopped from claiming, as it does in its Brief at p. 42-43 that it "explained, to the extent possible how each Unit 1 employee…was selected" and that "there was no "detailed description" of the selection process that could be articulated beyond [ALPA's discretionary process]" when it has gone to such great effort to withhold that very same information. In opposing subpoena requests by the General Counsel and the Charging Party for documents showing how it made its layoff-selection decisions, ALPA argued that it must protect this information from disclosure, stating, "But we have requested a protective order that these materials related to ALPA's exercise of its management discretion in the selection process for RIFs, that these materials not be shared with Unit 1." (Tr. 19:1-5) ALPA simply can't have it both ways: it either had to provide information about how employees were selected for layoff (to allow the judge and the Board to evaluate whether the 2009 layoff was consistent with ALPA's alleged past practice), or abandon its argument that it provided all of the information about the layoff-selection process.

Based on the foregoing, Respondent has no defense for failing to provide Unit 1 with the information it requested regarding the layoffs announced in 2009, and it is respectfully urged that the Board affirm the judge's finding that ALPA has violated the Act as alleged in the complaint.

C. As a Result of ALPA's Serious Unremedied Unfair Labor Practices, the Parties Could Not Reach a Good-Faith Impasse as a Matter of Law.

It is well-established that "a lawful impasse cannot be reached in the presence of unremedied unfair labor practices." *Titan Tire Corp.*, 333 NLRB 1156, 1158 (2001), quoting

White Oak Coal Co., 295 NLRB 567, 568 (1989). And, in the absence of a lawful, good-faith impasse, an employer may not unilaterally implement its final offer. *Id.* There are at least two ways in which an unremedied unfair labor practice can contribute to the parties' inability to reach an agreement. First, an unfair labor practice 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. *Titan Tire Corp.*, 333 NLRB at 1158, quoting *Alwin Manufacturing Co.*, 192 F.3d 133, 139 (D.C. Cir. 1999).[16]

The facts of this case show that ALPA's unilateral layoffs prevented a lawful, good faith impasse. The testimony of Unit 1's negotiators demonstrates that the layoffs increased the friction at the bargaining table, and the judge credited their accounts. Klocke explained that the Herndon layoffs changed the focus of negotiations, made the negotiations more difficult, and increased the contentiousness of the parties' discussions. He explained that ALPA's decision to RIF the more-senior Unit 1 employees became a "real sore point" for the employees. Iverson described a different, negative tone in bargaining, and how the layoffs created an air of mistrust between Unit 1 and ALPA. This air of mistrust is bolstered by Woody's statements that Unit 1 was "waiting for the other shoe to drop," and his astonishment at the amount of secrecy in negotiations. Additionally, Iverson testified that he was "infuriated" by the announcement of the layoffs on January 7. Union president Wells explained how the Herndon layoff cast an immediate chill over the membership.

[16] On several occasions, ALPA misrepresents that the General Counsel and/or the Charging Party conceded that the parties were at a good-faith impasse (e.g. Brief at 4; 44), citing pages 156:18-25 and 158:3-8 of the record. The General Counsel has not conceded that the parties were factually at impasse. Rather, the General Counsel has stated that it was *immaterial* whether they were at loggerheads because Respondent's unfair labor practices prevented a lawful good-faith impasse.

It should also be remembered that the Unit 1 negotiators were bargaining over their own terms and conditions of employment with some of their own supervisors. Therefore, when Collie announced that there would be a layoff south of Minneapolis, she not only indicated that ALPA was not turning from its path of unilateral layoffs, but she also sent a signal to Unit 1's negotiating committee that their own livelihoods may be at stake.

Beyond increased friction at the bargaining table, the layoffs made Unit 1 change the focus of its efforts at the table and required a lot of attention. Klocke explained that after the layoffs, the Unit 1 committee became very concerned about trying to save jobs. In light of the RIFs, rehire, severance, and job security became "very difficult, troubling issues." Iverson confirmed that Unit 1's bargaining strategy "definitely" changed after the Herndon RIFs, and Unit 1 definitely began "throwing our weight onto bargaining on the RIFs and on the contract essentially." When Unit 1 presented its February proposals, Klocke explained that there was definitely more of an emphasis and greater degree of radicalization in Unit 1's approach, and the Union shifted its priorities to Minneapolis and Atlanta. Iverson testified that after the Minneapolis RIFs, Unit 1 proposed that there would be no more RIFs during the term of the agreement because Unit 1 was "desperately trying to get something in the next contract…We were just desperate, I guess, in the abyss of trying to get something."

The layoffs also affected bargaining about other subjects because Unit 1 had to place a greater emphasis on job security. As an example, when the parties were discussing retiree healthcare, Woody told ALPA that "health insurance doesn't matter if you're not going to have a job." Toward the end of negotiations, Unit 1 presented its proposals as "comprehensive packages" so that ALPA would have to take Unit 1's proposals on job security in exchange for concessions on other subjects. Even Collie testified that ALPA recognized that job security was a

high priority for Unit 1 at the time ALPA imposed its final offer. In fact, of the three issues identified as being open on May 7, job security was arguably the most difficult. The record shows that there were discussions that the red-circle issue would not prevent an agreement, and the parties realized that ALPA had the right to do what it wished on the retiree health plan because Unit 1 did not represent retirees.

ALPA's reliance on *Aramark Educational Services, Inc.*, 355 NLRB No. 11 (2010) is misplaced. Most importantly, this decision was a two-member Board case that was vacated by the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 560 U.S. _____; 130 S.Ct. 2635 (2010), and thus, this decision is void and has no precedential value. On the merits, the *Aramark* case is plainly distinguishable. First, the Board affirmed the judge's recommendation to dismiss the failure-to-provide information allegation because the employer provided the relevant information to the international union, rather than the local. 355 NLRB No. 11, slip op. at 1 fn3. In this case, there is ample evidence that ALPA unlawfully refused to provide the information requested by Unit 1. Next, the impasse issue in *Aramark* was not during contract negotiations, but over the single issue of the respondent's unilateral change. In *Aramark*, the Board found that the respondent violated Section 8(a)(5) when it unilaterally changed its policy regarding no-match letters from the Social Security Administration. But, after discussions with the union, the employer agreed to "freeze" the implementation of this policy, and the parties bargained. The union's position was that the policy should not be enforced at all, and the employer's position was that various federal laws required it to begin enforcing its long-dormant no-match policy. Having bargained to impasse on the only open issue, the Board found that the employer's decision to implement its policy was consistent with the Act. While Aramark agreed to freeze its unilaterally implemented policy during bargaining, in this case, ALPA not only *refused to*

bargain over layoffs, but continued to conduct layoffs throughout the course of contract negotiations with Unit 1. Simply put, there is nothing in the Board's *Aramark* decision that provides any relief for ALPA.[17]

While ALPA claims that its decision to unilaterally implement its last offer was temporally removed from the unilateral layoffs, and thus excused its conduct, the record tells a different tale. In fact, to see that ALPA's unfair labor practices were still a prominent issue, one need look no further than ALPA's April 17 demand that Unit 1 withdraw its unfair labor practice charge over the layoffs. Also, Union president Jay Wells' March 29 letter to ALPA management cites ALPA's unilateral layoffs, and the pending unfair labor practice charge as part of the "non-economic wrongs" that have been inflicted on the employees during contract negotiations. Wells stated that "[t]he 2009 layoffs occurred without proper notice, without a proper response to Unit 1's legitimate requests for information and in the face of ALPA's refusal to bargain over related issues." (GCx 55, p. 3) Finally, at their meeting on April 16, when ALPA presented its "last, best and final proposal," Wells testified without contradiction, that he hoped their offer had job security. In sum, the evidence shows that ALPA's unilateral layoffs catapulted job security to the

[17] Similarly, this case is also distinguishable from *Litton Systems*, 300 NLRB 324 (1990), *J.D. Lunsford Plumbing*, 254 NLRB 1360 (1981), and *Quirk Tire*, 330 NLRB 917 (2000), which Respondent cites. In *Litton*, where the main issue was allegations of surface bargaining, the Board found a legal impasse because the employer's unilateral changes "involved minor topics only and [were] far from crucial to the failure of the parties to reach agreement." *Id.* at 333. The unilateral changes in *Litton* included an extra half hour for lunch the day before Christmas and changing a rule about meetings in the cafeteria and on the patio, which were hardly comparable to ALPA's decision to unilaterally and permanently lay off employees.

In *J.D. Lundsford Plumbing*, the employer fully remedied the unilateral change during bargaining, something ALPA has not done. Also, the union in that case insisted that the employer adhere to the terms of a multi-employer agreement, or take terms *worse* than those proposed in the agreement because the union was constrained by a most-favored-nations clause. Because the employer had claimed poverty, the judge concluded that the parties had reached a lawful impasse. *Id.* at 1371.

In *Quirk Tire*, the Board noted that there was "no evidence…that the parties discussed or were influenced by the respondent's unlawful [unilateral change.]" *Id.* at 917. Certainly, there is abundant evidence in this record that ALPA's unilateral layoffs were discussed and influenced Unit 1.

forefront of the negotiations, where the issue remained until ALPA decided to implement its last offer.[18]

Respondent was also unable to reach a lawful, good-faith impasse because it had failed to provide information to Unit 1 that was necessary and relevant to the negotiations.[19] "A legally recognized impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations. A failure to supply information relevant and necessary to bargain constitutes a failure to bargain in good faith in violation of Section 8(a)(5), and no genuine impasse could be reached in these circumstances." *United States Testing Co.*, 324 NLRB 854, 860 (1997), quoting *Decker Coal Co.*, 301 NLRB 729, 740 (1991). See also, *Wilen Manufacturing Co.*, 321 NLRB 1094, 1097 (1996).

There can be no serious dispute that Respondent failed to furnish information about the layoffs to Unit 1, and as discussed above, ALPA was not privileged to withhold this information from Unit 1. The information that Unit 1 asked for was plainly relevant to the negotiations, and ALPA's failure to furnish this information hobbled the Union's ability to generate proposals. Woody described the process as being "forced to throw darts down a pitch black hallway at a target we can't see." Iverson discussed that ALPA's refusal to provide information made Unit 1 "throw everything we had" into the proposals. Woody told ALPA that Unit 1 was being forced to try to put "contractual straightjackets" on ALPA. As a further example, Iverson explained that it

[18] Accordingly, *Washoe Medical Center*, 348 NLRB 361 (2006) is factually inapposite from this case. In *Washoe*, the unilateral change was a year and a half before the respondent declared impasse, and "[s]ignificantly, the issue of increased wage rates for new employees was not an issue at the time of impasse." *Id*. at 362.

[19] At times, ALPA has tried to distinguish its unilateral layoffs from the negotiations for a successor collective-bargaining agreement. Klocke explained that Unit 1's information request was relevant to proposals that the Union intended to make during bargaining. (Tr. 190:25-191:11) Moreover, Collie admitted that Wells told her that the bargaining committee had the authority to bargain over layoffs, whether they occurred under the extant collective-bargaining agreement or a successor contract. (661:9-16)

was difficult for Unit 1 to formulate proposals for the Minneapolis employees because the Union committee did not know who it was bargaining for.

The information that Unit 1 was seeking was clearly relevant and necessary to bargaining. It is undisputed that job security was one of the central issues during negotiations, if not *the* central issue. The testimony of Unit 1's representatives shows that Respondent's failure to provide information interfered with the Union's ability to engage in meaningful bargaining. Coupled with the increased friction and unilateral changes that ALPA injected into the parties' negotiations, the resulting circumstances made a lawful, good-faith impasse legally impossible to achieve.[20]

D. Respondent Unlawfully Discontinued Its Merit Pay Program.

It is undisputed that ALPA ceased paying merit increases after March 31, 2009. 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

[20] In its brief at p. 40, fn28, Respondent asserts as a defense that Unit 1 didn't request the Herndon employees' names until the day before the layoff, without acknowledging that this was also when the Union first learned of the layoffs. ALPA argues that because it provided the names within one day or at the same time as the layoffs, it satisfied its legal obligations. But the Board has recognized the perishable nature of information. *Woodland Clinic*, 331 NLRB 735, 737 (2000) ("This sequence of events severely diminished the usefulness to the [u]nion, at the time it was provided, of the requested information. The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as the circumstances allow.") Respondent's representative Jim Johnson explained that the only reason for delay was so that ALPA, and not Unit 1, would be the first to inform the affected employees of their layoffs. But by choosing to withhold this information until after the layoffs were announced, ALPA seriously diminished its usefulness toward Unit 1's goal of crafting proposals to eliminate or mitigate the layoffs in the first place.

(1994), enfd. 73 F.3d 406 (D.C. Cir. 1996). Therefore, absent a waiver or a good-faith impasse, ALPA violated the Act when it failed to continue its merit pay program after March 31, 2009.

First, ALPA argues that it was privileged to cease its merit pay program by the express terms of the collective-bargaining agreement. In this regard, ALPA claims that because the contract does not contain merit pay percentages that begin after March 31, 2009, the merit pay program ended upon the contract's expiration. While the merit pay percentages in Section 16 of the contract have beginning dates, *there are no end dates*. The most-recent merit pay rates are "effective" on April 1, 2008. Moreover, an examination of the entirety 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.[21]

ALPA also tries to argue that Unit 1 agreed to a two-year wage freeze, and therefore, it was privileged by either the standstill agreements, or its unilateral imposition on May 7 to set the

[21] 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)

merit pay rate at zero percent beginning on April 1. However, the evidence does not support these claims. The testimony and documentary evidence in the record show that Unit 1's agreement to a wage freeze was contingent on reaching an overall agreement, and this contingency was not met. The standstill agreements yield the same result. The April 1 standstill agreement explicitly provides that the "terms of the new agreement" will be retroactive to April 1, 2009. But since there is no dispute that the parties did not reach a "new agreement," there are no terms that the parties agreed to make retroactive to April 1. The fact that the parties have used standstill agreements in the past to make merit pay retroactive does not answer whether ALPA's conduct in 2009 was lawful. The major distinction between the standstill agreements in prior years and what occurred in 2009 is that in past years, the parties reached a new contract. In 2009, however, the parties never reached a new agreement, which makes the situation presented in this case distinguishable from the parties' past practice.

Finally, ALPA argues that Unit 1 waived the continuation of merit pay after March 31 when Collie and Klocke negotiated their standstill agreements. (Exceptions Brief at p. 67) However, the weight of the evidence does not support a conclusion that Unit 1 clearly and unmistakably waived the continuation of merit pay.

The evidence shows that in the days leading up to March 31, 2009, tensions were mounting. Unit 1 was engaged in informational picketing, and the membership had taken a strike vote. ALPA was concerned that there would be a work stoppage and began taking measures to prepare.[22] With only hours before the contract expired, all parties agree that Collie and Klocke negotiated a standstill agreement for 24 hours. Both parties agree that this standstill amounted to

[22] Evidence of the precise steps ALPA took to prepare for a Unit 1 strike was rejected as irrelevant at the hearing. See GC Cross-Exception #6.

a 24-hour extension of the contract, and an agreement that neither side would take economic action against the other.

Collie and Jim Johnson claim that they also made an explicit agreement with Unit 1 that merit pay would not continue past the contract expiration date. But when Collie testified about what exactly was said when this agreement was reached, she makes merit pay sound almost like an afterthought. "We thought it made sense to extend the time to negotiate and to stop the clock. And we said everything carries over, we won't make any changes." Up until this point, Collie's testimony is consistent with Unit 1's testimony, Lorenzetti's bargaining notes, and the subsequent written standstill agreements. But then Collie adds, "I remember Jim Johnson saying with the exception of merit."

Klocke and Iverson firmly and unequivocally denied that such an agreement on merit pay was reached, their testimony is corroborated by other facts in the record, and the judge credited their testimony. As an initial matter, ALPA has not produced any documentary evidence supporting the testimony of Collie and Jim Johnson. None of the subsequent written standstill agreements contain any reference whatsoever to merit pay. In fact, when Collie negotiated the April 16th standstill agreement with Wells, she described the "essential elements" of the standstill agreement without any mention of merit pay. Not only do none of the standstill agreements corroborate ALPA's version, none of the contemporaneous bargaining notes do either. To the contrary, it is Margarita Lorenzetti's bargaining notes that appear to support Unit 1's position. Lorenzetti recorded the March 31st standstill agreement as "Extend contract 24 hours." Although she was in charge of financial matters, it apparently did not occur to her to record the purported statements of Collie and Jim Johnson. Viewed objectively, Lorenzetti's notes support a conclusion that the all of the contract's terms were extended for 24 hours, which would certainly

include the mandatory subject of merit pay. This conclusion is even more reasonable in light of the fact that ALPA continued to honor contract terms such as dues check-off. Of course, Lorenzetti's subjective understanding is not in the record because ALPA chose not to call her as a witness. Furthermore, although Collie was the chief note taker for ALPA, she did not make any indication in her bargaining notes that either she or Jim Johnson excluded merit pay from the standstill agreement.

In addition to the documentary evidence, the surrounding circumstances also make Unit 1's version more credible. Klocke and Iverson testified that preventing economic action was the central purpose of the standstill agreements. Their testimony is supported by the undisputed fact that Unit 1 was preparing for a strike, and also because economic action is specifically listed in the subsequent agreements negotiated between the parties.

Finally, the March 31st standstill agreement was scheduled to last only for 24 hours. To listen to Collie and Jim Johnson, their testimony presents an image of how they made it a special point to explicitly carve out merit pay from all of the other continuing contract terms. But there were only three employees with anniversary dates during this 24-hour window, and the effort they claim to have put into negotiating the suspension of merit pay seems disproportionate to the benefit. Out of all of the terms in the collective-bargaining agreement, they apparently formed an intense focus on a provision that only affected three employees. Yet this intensity never resulted in anyone from ALPA making any written recordation of its agreement with Unit 1.

The end result of this evidence is that not only do Klocke's and Iverson's denials have more evidentiary support that ALPA's claimed agreement, but that as a consequence, ALPA has failed to establish that Unit 1 clearly and unmistakably waived the continuation of merit pay past March 31, 2009.

As an alternative defense, ALPA argues that this situation presents an exception to the general rule requiring bargaining by claiming that that the payment of merit pay is a "discrete event," citing *Stone Container*, 313 NLRB 336 (1993), *TXU Electric Co*., 343 NLRB 1404 (2004), *Neighborhood House Association*, 347 NLRB 553 (2006), and *Alltel Kentucky*, 326 NLRB 1350 (1998). See also *St. Mary's Hosp. of Blue Springs*, 346 NLRB 776 (2006). In this regard, ALPA asserts that even if it is found to have unlawfully discontinued the merit pay program, the appropriate remedy would be to require ALPA to bargain with Unit 1 to set the post-March 31, 2009 merit rates. These cited cases are distinguishable from this case, and most importantly, ALPA's "discrete event" argument must be rejected once a determination is made that ALPA unlawfully discontinued the merit pay program.

As an initial matter, there is no "discrete event" when it comes to merit pay. 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.[23]

[23] *Alltel Kentucky* is additionally distinguishable from the present case because in *Alltel*, the union knew about the employer's past practice of granting annual wage increases, and the employer's proposal to discontinue the upcoming wage increase, but failed to request bargaining. In this case, however, the judge credited testimony showing that ALPA did not provide any notice that it was going to suspend merit pay payments. (ALJD 10:21-23)

Furthermore, the dispute in each of the cited cases arose during *negotiations for an initial contract,* not the mature bargaining relationship present in this case. 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. These experienced parties bargained for an agreement that provides a start date for the merit pay rates, but no ending date. The language of the contract provides for specified pay increases beginning on set dates. Presumably, if ALPA or Unit 1 intended these rates to apply for only a single year, they would have specified an end date for the final period listed in the contract. Having failed to do so, these rates should rightly continue until they are replaced by different rates through bargaining, or after the parties have reached a lawful, good-faith impasse.

ALPA claims that the judge cannot order a specific merit pay because that rate can only be determined through the collective-bargaining process. This argument overlooks, as discussed above, that the merit pay rates *have already been set through bargaining*. The problem is that Respondent unilaterally stopped paying them before reaching a good-faith impasse. Moreover, Respondent's explanation that it didn't know what rates to pay after March 31st is belied by the fact that Respondent *did* pay merit pay increases to four employees after the contract expired.[24]

[24] Respondent's reliance on *Coronet Industries, Inc.* 2003 WL 22114706 (2003) is mistaken because it is well-established that ALJ findings in the absence of exceptions are not considered precedent in any other case. *Colgate-Palmolive Co.*, 323 NLRB 515 fn1 (1997).

Even if the Board finds that the parties were at a lawful good-faith impasse on May 7, 2009, that would still not privilege ALPA's unilateral implementation of wage freeze on April 1, which was 37 days before the alleged impasse was reached. When parties are engaged in negotiations for a new contract, an employer can not unilaterally make individual changes unless and until and overall impasse on bargaining for the agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373 (1991).

E. ALPA Failed to Bargain in Good Faith Over Elaine Grittner's Layoff.

In a shocking display of temerity, ALPA claims that it "did, in fact, bargain over [Elaine] Grittner's layoff." (Exceptions Brief, p. 37) It is astounding that ALPA – itself a labor organization – would claim that it bargained over Grittner's layoff *when its own negotiators* said that they were **not bargaining**. When asked if ALPA was bargaining over Grittner, Collie unambiguously testified "No." (Tr. 669:20-670:1) Similarly, when asked by Unit 1 if ALPA was bargaining, Jim Johnson replied, "No." (Tr. 220:17-20) On this factual record, it is amazing that ALPA would claim that it was bargaining over Grittner, or that it engaged in a "process that was equivalent to bargaining" (whatever that means.) Then, after announcing at the outset of its meeting with Unit 1 that it was *not* bargaining, ALPA has the audacity to assert that after setting aside two days to meet regarding Grittner, "there did not appear to be any viable alternative to her layoff." (Brief, p. 38 fn.25) Despite its assertions to the contrary, the evidence shows that ALPA entered its discussions with Unit 1 with a closed mind, having already picked the day that Grittner would be "out the door," not the fair and open mind required by Section 8(d) and 8(a)(5). ALPA cannot credibly point to its meetings with Unit 1 as evidence that it satisfied its duty to bargain when ALPA itself poisoned the well at the outset of the parties' discussions.

The legal framework of ALPA's obligation to bargain is well-established. The Board has held that an employer's decision to streamline its workforce, to allow it to do the same work with fewer employees, is a mandatory subject of bargaining. *Holmes & Narver*, 309 NLRB 146, 147 (1992). See also *Westinghouse Electric Corp*., 313 NLRB 452, 453 (1993), enfd. mem. 46 F.3d 1126 (4th Cir. 1995). In *Holmes & Narver*, for example, the Board found that an employer's decision to combine jobs, reassign work, and lay off unit employees was a mandatory subject of bargaining. 309 NLRB at 146. The Board highlighted that the employer "did not abandon a line

of business or cease a contractual relationship with a particular customer, or make any other change that significantly altered the scope and direction of its business." *Holmes & Narver*, 309 NLRB at 147. Unlike decisions that involve a change in the scope and direction of business, this kind of decision falls under the second category of management decisions enumerated in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), that are "almost exclusively an aspect of the relationship between employer and employee and are mandatory subjects of bargaining." *First National Maintenance*, 452 U.S. at 677 (internal citations omitted.) See also *Holmes & Narver*, 309 NLRB at 147; *Kajima Engineering & Construction*, 331 NLRB 1604, 1619-1620 (2000) (layoffs due to lack of work fit into the second *First National* category and are mandatory subjects of bargaining.) Here, ALPA has conceded that Grittner's layoff was a mandatory subject of bargaining by stating that it was not asserting defenses under *First National Maintenance* or *Dubuque Packing Co.*.[25]

Because the decision to lay off Grittner was a mandatory subject of bargaining, ALPA had a duty to bargain over it in good faith. The duty to bargain does not require the parties to reach an agreement, but it does require "more than a willingness to enter into sterile discussion of union-management differences." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 402 (1952); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). Thus, parties have a duty to approach bargaining with a fair, open mind, and a "sincere purpose to find a basis of agreement…" *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960), citing *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1959).

[25] ALPA claims that it had no obligation to bargain with Unit 1 over the decision to eliminate Grittner's position because it was acting in accordance with the terms it unilaterally imposed in May 2009. ALPA may not unilaterally impose a waiver of Unit 1's statutory rights to bargain over the decision to layoff, even if the parties had reached a lawful impasse prior to the May 7 imposition. See, for example, *Raven Government Services*, 331 NLRB 631, fn.3 (2000), relying on *Control Services*, 303 NLRB 481, 484 (1991), enfd. mem. 975 F.2d 1551 (3d Cir. 1992), "Where an employer proposal seeks the union's waiver of statutory rights…impasse is no substitute for consent."

Here, ALPA failed to bargain in good faith with Unit 1. Prior to meeting with the Union on December 14 and 15, 2009, ALPA stated that it did not intend to bargain, and would only "discuss" the layoff with the Union. At the meeting, ALPA's representatives again stated that it was not there to bargain, only to meet and confer. Respondent's actions confirm these statements as it did not make any proposals, but instead flatly rejected every proposal offered by Unit 1. And, in fact, ALPA admitted to Unit 1 that it had already notified Grittner that she was laid off. Thus, ALPA cannot be said to have approached the meeting with an open mind and a sincere desire to reach an agreement. Therefore, ALPA violated Section 8(a)(1) and (5) of the Act because it failed to bargain in good faith over the elimination of Grittner's position.

IV. CONCLUSION

The preceding evidence and arguments show that Unit 1 did not waive its right to bargain over the layoffs in 2009, and that ALPA's failure to bargain over these layoffs and to provide relevant information precluded a lawful good-faith impasse. Consequently, Respondent's unilateral imposition of its last contract offer, including the retroactive discontinuance of the merit pay program was also unlawful. Finally, the evidence clearly establishes that Respondent failed to bargain over Elaine Grittner's layoff. Therefore, it is respectfully urged that the Board affirm the judge's findings that ALPA committed the violations alleged in the amended complaint.

Respectfully submitted,

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Dated this 26th day of July, 2011

STATEMENT OF SERVICE

I hereby certify that copies of the Answering Brief of the Counsel for the Acting General Counsel were served by e-mail, on the 26th day of July 2011, on the following parties:

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