

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

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL (ALPA)

5-CA-34837

5-CA-35014

and

5-CA-35244

5-CA-35419

UNION OF ALPA PROFESSIONAL AND ADMINISTRATIVE
EMPLOYEES, UNIT 1 (UNIT 1)

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

Devki K. Virk
Kathleen Keller
Matthew Clash-Drexler
BREDHOFF & KAISER, PLLC
805 15th St. N.W. Suite 1000
Washington, DC 20005
(202) 842-2600 (Tel.)
(202) 842-1888 (Fax)

INTRODUCTION

As the General Counsel states, “this case boils down to a few central points.” GC Brf. at

1. The most significant of the points before the Board is the ALJ's failure to give appropriate weight to decades of bargaining history and decades of past practice, both of which demonstrate that the parties had a shared understanding of the meaning of the parties' collective bargaining agreement.

As we previously showed, under established Board law, ALPA's actions did not violate the Act. ALPA bargained in the same way – and over much the same issues – as it had in previous years, both with respect to merit-based pay increases and layoffs. ALPA and Unit 1's shared history demonstrates that merit pay increases have always been negotiated for specific contract years, and therefore do not survive contract expiration. Recognizing that fact, in 1996 and 2004, Unit 1 was forced to negotiate that the merit pay percentage increase in the new CBA would be applied retroactively to the date that the prior CBA expired. Similarly, notwithstanding mid-contract layoffs in 1985, 1994, 1996, 1999, 2002, 2003, 2004, 2005, and 2008, Unit 1 had never bargained or sought to bargain with ALPA over those layoffs or the effects of those layoffs, instead treating the contract language as controlling. In recognition of the fact that it had waived any right to bargain, Unit 1 sought unsuccessfully in subsequent CBA negotiations to curtail ALPA's discretion. In short, ALPA's conduct was at all times consistent with the parties' long-standing interpretation of the CBA. By contrast, it was Unit 1 who admittedly had a mid-contract “change in philosophy” that led to these charges. Tr. 626:3-5. The ALJ's Decision (“ALJD”) fails to properly apply Board law respecting the significance of this history, thereby depriving ALPA of the benefit of its carefully negotiated bargain and undermining the integrity of the collective bargaining process. For these reasons, the ALJD must be reversed.

I. ALPA DID NOT UNLAWFULLY DISCONTINUE PROVIDING MERIT-BASED WAGE INCREASES.

1. The ALJ found that ALPA violated the Act by failing to provide Unit 1 employees with wage increases tied to their performance evaluations (referred to by both parties and the General Counsel as merit increases) following the expiration of the 2004-2009 contract. Unit 1 and the General Counsel argue that, for ALPA to cease paying merit increases following expiration of the CBA, ALPA must show that Unit 1 waived its statutory right to bargain over changes to past practices. *See* GC Brf. at 66; Unit 1 Brf at 66.¹ This argument misses badly. As an initial matter, none of the cases cited by the General Counsel or Unit 1 suggests that a wage increase *collectively bargained for a specific contract year* must be given—again and again—following the expiration of the collectively-bargained contract.²

Further proving fatal to the ALJD is that ALPA does not argue waiver with respect to the merit pay question. Rather, ALPA argues that, a review of the 2004-09 CBA, the related bargaining history, and the parties' past practice in negotiating merit increases in the two prior CBAs, confirms the “established practice . . . regularly expected by employees” and their union was for the merit increase rate to be negotiated between ALPA and Unit 1 for specific contract years and thus that the rate would not survive contract expiration. *Daily News of Los Angeles*, 315 NLRB 1236, 1236 (1994), *enf'd*, 73 F.3d 406 (D.C. Cir. 1996); *see* also ALPA Brf. at 61-66.

Unit 1 and the General Counsel respond by arguing that the CBA does not support ALPA's interpretation because the columns in the CBA section showing the negotiated merit pay

¹ The General Counsel's brief suggests that ALPA has argued that Unit 1 expressly agreed to terminate the merit pay program after contract expiration, or waived payment of merit pay as part of the standstill agreement. GC Br. at 66-67. ALPA did not advance either argument before the ALJ, or in its opening exceptions brief, and therefore the General Counsel's argument on these points is simply inapposite.

² Indeed, Unit 1's description of the facts in *Daily News* as “similar to those here,” Unit 1 Br. at 65, is telling. In that case, the employer had a unilaterally established practice of granting merit increases, which the employer determined in its own discretion.

increases are headed “effective [beginning of the contract year]” but contain no termination date, thereby undermining, they argue, ALPA’s point that the merit increase schedules are limited to the one year in which they apply. But any ambiguity in the contract language is resolved by the clear and unambiguous statements of the parties both during the course of negotiating the 2004-09 CBA and following its expiration. Specifically, Unit 1’s chief negotiator emailed Kelly Collie the day after ALPA and Unit 1 reached agreement on the 2004-09 CBA, describing the merit pay agreement as: “4-1-07 Merit rates *to apply for 4-1-08 to 3-31-09.*”³ And, if the merit increase rates applied indefinitely (as the General Counsel suggests), there would have been no need even to add a new column—as Unit 1’s drafter did—for the 2008-2009 contract extension (“effective 4/1/08,” just as the last year’s merit schedule was “effective 4/1/07”), when that extension provided the same rate as in the prior year. *See* ALPA Brf. at 64 & n.42. The General Counsel dismisses these contemporaneous statements as irrelevant, *see* GC Brf. at 66 n.21, and Unit 1 fails to address them at all. But they stand as plain and unrefuted evidence that both parties understood that they had negotiated a rate for the one year of the contract extension only.

The parties’ negotiation of a standstill agreement following the expiration of the 2004-09 CBA compels the same conclusion. In that agreement, Unit 1 and ALPA agreed that whatever rate the parties ultimately agreed upon for merit increases would be applied retroactively to April 1, 2009. If, as Unit 1 and the General Counsel now contend, the language of the CBA required ALPA to continue the merit increase rate set forth in the expired CBA, Unit 1’s negotiation of retroactivity was unnecessary.⁴

³ R. Exh. 26 at 4 of the exhibit (emphasis added); *see also* Tr. 571:4-12 (Collie testifying the email summarized the parties’ agreement “that the merit rates that were effective 4/1/07 would be applied from 4/1/08 to 3/31/09.”).

⁴ Unit 1 and the General Counsel make much of ALPA’s acknowledged clerical error in paying four employees merit raises after March 31. Unit 1 Brf. at 67 n.35; GC Brf. at 29, 71. Indeed, the General Counsel even contends that these four erroneous merit payments somehow undercut ALPA’s argument

In sum, the record evidence leads to one conclusion: the CBA, as confirmed by the parties' bargaining notes and past practice, sets forth a specific merit-based pay percentage increase that is applicable only to a defined contract year. Accordingly, the ALJ's finding that the merit pay rate survives contract expiration must be reversed.⁵

2. What emerges from the parties' opposing submissions is that the determinative issue is how to interpret Section 16 of the CBA—specifically, whether the merit pay increases set forth in the CBA apply only to a specific contract year, as ALPA asserts, or indefinitely, as Unit 1 and the General Counsel contend. As a case of contract interpretation, the Board, in a long line of cases, has made clear that it will not decide the matter if the employer had a “sound arguable basis” for its interpretations and the actions it took pursuant to that interpretation. *See NCR*

that, after the expiration of the 2004-09 agreement, ALPA did not know what rate to apply. GC Brf. at 29, 71. This argument amounts to no more than wordplay. The facts are clear that ALPA did not know what rates to *properly* apply and recouped the merit pay increases that were erroneously paid. Tr. at 664.

⁵ Unit 1 claims that, pushed to its limits, ALPA's argument would mean that *all* terms of the agreement would expire as of March 31 – clearly an absurd result, and not one advocated by ALPA. Unit 1 Brf. at 67; ALJD at 10. But this slippery slope argument cannot trump the surprising and novel result of the General Counsel's position here—that a wage increase collectively-bargained for a specific contract year must be applied every year post contract expiration, *ad infinitum* until agreement or impasse.

The same flaw plagues Unit 1's rebuttal of ALPA's reliance on the *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949), and *Ironton Publications*, 321 NLRB 1048 (1996), line of cases. Unit 1 asserts that it would not have been a ULP for ALPA to grant employees a wage increase not agreed to in bargaining because ALPA had an established practice of paying merit increases. But this logic ignores the fundamental fact that ALPA's established practice (unlike in those cases cited by Unit 1) was for ALPA to determine the annual increase rates in bargaining with Unit 1. Accordingly, there can be no dispute that it would have been an unfair labor practice for ALPA to have determined the rate increase unilaterally. Instead, by attempting to negotiate a rate with Unit 1, ALPA adhered to the parties' established practice.

Equally flawed is the attempt of Unit 1 and the General Counsel to rebut ALPA's *Stone Container* argument. The General Counsel claims there is no applicable “discrete event” in this case (GC Brf. at 70). However, each individual employee's anniversary date is a “discrete event” upon which ALPA must determine a wage increase. And, Unit 1 cannot claim that it had no notice of ALPA's intent not to process any merit pay increases until the parties negotiated the applicable rate. As set forth above, the established practice of the parties made clear that ALPA would not process any such payments following expiration of the CBA but before an agreement on the applicable rate. Moreover, that Unit 1 understood ALPA's position was made clear by the fact that Unit 1 bargained for a retroactivity provision in the post-expiration standstill agreement. *See supra* at 3. These facts clearly distinguish the instant case from *Covanta Energy*, cited by Unit 1 at p. 70, where the employer's purported notice was limited to proposals at the bargaining table. To be sure, ALPA, like the employer in *Covanta*, had consistently put forth a 0% rate in bargaining. ALPA and Unit 1's past practice provided Unit 1 with sufficient notice of its intent not to process merit pay increases after expiration of the CBA.

Corp., 271 NLRB 1212, 1213 (1984).⁶ Given the parties’ past practice and bargaining history—including, as set forth above, Unit 1’s own contemporaneous notes showing that the merit pay increases applied only to a specific contract year—no credible argument can be advanced that ALPA’s interpretation is an unreasonable or implausible one. Accordingly, the ALJ erred as a matter of law by finding that ALPA violated Section 8(a)(5) of the Act.

II. ALPA HAD NO OBLIGATION TO BARGAIN OVER THE 2009 LAYOFFS

As we discussed in our opening brief, the text of the ALPA-Unit 1 CBA (specifically Section 11), when interpreted in light of the parties’ past practice and bargaining history, constitutes a clear and unmistakable waiver of any right to bargain over the layoffs and their effects. *See* ALPA Brf. at 18-36.⁷ The General Counsel and Unit 1 respond by arguing that, to establish waiver, ALPA must show a *single moment* where Unit 1 expressly waived its right to bargain over layoffs. Unit 1 Brf. at 52, 55-64; GC Brf. at 46-54. This argument flies in the face of well-settled Board law, which makes clear that waiver need not be based on express contract language but instead can be inferred from past practice and bargaining history.⁸

Indeed, their argument misses the forest for the trees. Contrary to the position taken by the GC and Unit 1, ALPA is asserting that Section 11 of the CBA constitutes Unit 1’s waiver of

⁶ *See also Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988) (“Where . . . the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the Union, we will not seek to determine which of two equally plausible contract interpretations is correct.”); *Vickers, Inc.*, 153 NLRB 561, 570 (1965) (finding that the Board will not find an 8(a)(5) unilateral change if the record shows that “an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it”).

⁷ Although the Board does not recognize the “contract coverage” doctrine, ALPA’s argument is even stronger under that doctrine. *See NLRB v. United States Postal Serv.*, 8 F.3d 832 837 (D.C. Cir. 1993).

⁸ Both the General Counsel and Unit 1 mistakenly argue that *California Pacific Medical Center*, 337 NLRB 910 (2002), is inapposite because the case’s “past practice” merely supplemented an express waiver in the contract language. *See* GC Brf. at 46; Unit 1 Brf. at 63-64. The ALJ looked to past practice as a basis for concluding that the union had clearly and unmistakably waived its rights. *See California Pac. Med. Ctr.*, 337 NLRB at 914 (“[T]he past practice of the parties demonstrates that the Respondent has historically exercised, on numerous occasions, the right to lay off without prior bargaining about the decision to do so. A clear and unmistakable waiver may be inferred from past practice.”).

its right to bargain over layoffs. The parties' past practice and bargaining history makes this waiver clear. *Never once* in ALPA and Unit 1's lengthy bargaining relationship has Unit 1 bargained with – or even attempted to bargain with – ALPA over its many layoffs (in 1985, 1994, 1996, 1999, 2002, 2003, 2004, 2005, and 2008, R. Exh. 22).⁹ As to Unit 1's argument that ALPA engaged in bargaining with Unit 1 over whether to conduct either the 1994-1995 layoffs, or the 2004 print shop closure, (Unit 1 Brf. 61-62), the facts do not support the claim. In 1994, ALPA informed Unit 1 that, unless Unit 1 agreed to a wage freeze – which would require Unit 1 to agree to mid-term concessions on the contract– ALPA would conduct a layoff. Both the nature of the wage freeze and the layoff were unilaterally determined by ALPA. Unit 1 cites no evidence that ALPA ever compromised – or even was willing to compromise – over either proposal. The same is true of the print shop closure in 2004. *See* ALPA Brf. at 22-23.

Considered against this twenty-four year consistent pattern of Unit 1 never demanding to bargain over layoffs, Unit 1's failure to secure, during contract negotiations, limits on ALPA's long-standing right to conduct layoffs is dispositive. While the General Counsel argues that the bargaining history confirms that Unit 1 already had the right to bargain over the layoffs, *see* GC Brf. at 48, the opposite conclusion must be reached.¹⁰ Put simply, time and again Unit 1 made and subsequently abandoned proposals to place limits on ALPA's right to conduct layoffs. It

⁹ Unit 1 continues to argue that, under *Owens-Corning Fiberglas*, 282 NLRB 609 (1987), this seventeen year record does not constitute past practice. Unit 1 Brf. at 61 n.32. While it is true that a union's failure to challenge *one* unilateral action does not constitute a past practice, the failure to do so over a twenty-four year period does. ALPA Brf. at 24 n.17. *Caterpillar Inc.*, on which Unit 1 relies for the proposition that *Owens-Corning Fiberglas* applies to a series of unilateral changes, is not to the contrary. 355 NLRB No. 91, slip op at 3 (Aug. 17, 2010). Rather, in *Caterpillar*, the unilateral changes were sufficiently "disparate" that they did not constitute a past practice at all. As such, *Caterpillar* applied *Owens-Corning Fiberglas* to each individual change, not to a series of changes over time (as in this case). *Id.*

¹⁰ The General Counsel's showing is based primarily on after-the-fact testimony of Unit 1 witnesses regarding what its proposals were purportedly intended to do. *See* GC Brf. at 50-51. What is relevant, however, are not these post-hoc justifications but instead an examination of which proposals were exchanged, when, to what end, and with what result. This analysis, as set forth above, confirms that Unit 1 understood that ALPA had no obligation to bargain with Unit 1 over layoff decisions or their effects.

was, in short, an attempt to obtain a right it gave up in Section 11 of the CBA. As the Board made clear in *Manitowoc Ice, Inc.*, 344 NLRB 1222 (2005), challenging an employer’s unilateral action after “abandoning its effort in collective-bargaining to [restrict the employer through contractual terms],” is nothing short of an attempt by the union “to deprive the Respondent of the benefit of its bargain.” *See id.* at 1224. Accordingly, the Board found that the “Union has acquiesced in the Respondent’s position that the terms of the profit-sharing plan are a management prerogative and that, therefore, it is now equitably estopped from asserting otherwise.” *Id.* Those same reasons require rejection of the ALJ’s finding that ALPA had an obligation to bargain over the layoffs and their effects.¹¹

III. THE IMPASSE REACHED ON MAY 7, 2009 WAS LAWFUL.

Unit 1 and the General Counsel argue that ALPA’s refusal to conduct mid-contract bargaining over the January and February 2009 layoffs and their effects along with the purported failure to provide information concerning those layoffs *created* job security as a high-profile issue in bargaining where it otherwise would not have been. Unit 1 Brf. at 72-75, 77; GC Brf. at 61-62, 64-65. This story could not be further from the truth.

To begin, Unit 1 attempts to rewrite the applicable standard of review. First and foremost, the burden of proof on this question rests with the General Counsel. *See Washoe Medical Ctr., Inc.*, 348 NLRB 361, 362 (2006). Moreover, it is not enough, as Unit 1 asserts, for the General Counsel to show that unremedied ULPs “affect the negotiations.” *See* Unit 1 Brf. at 71. Instead, the General Counsel has the burden to establish a “causal connection between the

¹¹ In our opening brief, we discussed in detail why the ALJ erred in finding that ALPA failed to respond to valid requests for information. We write here to respond to Unit 1’s assertion that it required the names of the employees to be laid off *in advance of any layoff* so that it could bargain the effects of those layoffs. According to Unit 1, it needed the information in advance to address “the workload and assignments of other employees.” Unit 1 Brf. at 45. Because those “other employees” were still employed by ALPA, Unit 1 did not need the information *before* the layoffs in order to bargain with ALPA over the impact of the layoffs on those remaining employees.

previous unfair labor practices and the failure to reach an agreement.” *Edward S. Quirk Co.*, 330 NLRB 917, 917 (2000). The General Counsel has failed to meet this standard.

First, it strains credulity to argue that job security became an issue only because of ALPA’s conduct in connection with the 2009 layoffs. A comparison of the instant case to *Titan Tire Corp.*, 333 NLRB 1156 (2001), a case upon which the General Counsel and Unit 1 chiefly rely, aptly demonstrates this point. In *Titan Tire*, the Board found an unremedied ULP precluded impasse because the employer’s “unlawful conduct [caused] the *sudden addition* to negotiations of a critical issue.” *See id.* at 1159 (emphasis added). Here, however, each time negotiations followed a reduction-in-force, Unit 1 came to the bargaining table stating that job security was a “top priority.” *See* ALPA Brf. at 52. It is thus unimaginable that, in the wake of the 2008 layoffs (ALPA’s highest single-year layoff ever, eliminating 15 jobs, R. Exh. 22), which occurred less than a year prior to the 2009 negotiations, Unit 1 would not have focused on job security as a central issue in its negotiations for a new contract. And, as soon as ALPA proposed additional unit layoffs, job security would have immediately risen in importance for Unit 1—regardless of whether or not ALPA had agreed to bargain over the 2009 layoffs.

Second, even if ALPA’s refusal to bargain over the mid-contract layoffs caused Unit 1 to place greater importance on job security, ALPA’s conduct does not rise to the level of what the Board has previously found to taint the bargaining process so as to preclude lawful impasse. Here, ALPA took no steps to undermine the bargaining process itself; instead it acted in accordance with the parties’ long-standing practice with respect to layoffs. *See supra* at 5-7.¹² It

¹² It is perhaps for this reason that both Unit 1 and the General Counsel attempt to make much of Kelly Collie’s response to Unit 1’s inquiry in February 2009 regarding where the next layoff would take place: “south of Minneapolis.” Both the General Counsel and Unit 1 imply that this was a threat to the bargaining team members, rather than simply an honest answer to a question posed by the bargaining team. GC Brf. at 61; Unit 1 Brf. at 72-73. The General Counsel, however, chose not to proceed on this charge against ALPA, or otherwise allege in its Complaint that ALPA had attempted to threaten the

is therefore unconvincing for Unit 1 to argue that ALPA's conduct “changed the baseline for negotiations” because ALPA’s proposals for the successor contract “would have permitted ALPA to lay off employees . . . without bargaining with Unit 1.” Unit 1 Brf. at 74. That argument stretches the Board's baseline cases well past the breaking point, however, as any employer proposal for a contract term would permit it to act, in accordance with that term, without further bargaining with the union during the term of that contract. That is fair bargaining – not “moving the baseline” for negotiations.

Third, neither the General Counsel nor Unit 1 are able to undermine the fundamental fact that the parties were deadlocked on an entirely independent issue – that of retiree health. *See* ALPA Brf. at 54-58. The responses of the General Counsel and Unit 1 to this argument are entirely without merit. The General Counsel takes the position, inaccurately, that retiree health was not a real impasse issue because “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.” GC Brf. at 62. Unit 1 did, of course, represent *current* employees with respect to their future retiree benefits, and therefore ALPA could most decidedly *not* do what it wished on retiree health (changing eligibility criteria and prospective design and premiums) absent agreement or impasse with Unit 1. Unit 1’s argument is equally unavailing. Specifically, it contends that whether ALPA and Unit 1 were deadlocked over any other issue is irrelevant. This argument misstates applicable Board law. For example, Unit 1 attempts to dismiss the significance of the Board’s holding in *Washoe Medical Center, Inc.*, 348 NLRB 361 (2006), by asserting that when impasse was declared in that

bargaining team members (nor did he amend his Complaint after testimony to include such a charge). The General Counsel cannot now tell a story so far afield from the charges alleged in the Complaint.

In the same vein is the General Counsel’s suggestion that ALPA “demand[ed]” Unit 1 withdraw its ULP charge. GC Brf. at 63. ALPA made no such demand; rather, it made a wholly proper package offer in mediation to resolve the ULP together with the contract; when that proposal was rejected by Unit 1, ALPA in no way insisted on Unit 1 withdrawing the charge—as confirmed by the fact that the General Counsel never alleged that ALPA insisted on a non-mandatory subject of bargaining.

case, the parties “remained apart on more than 19 important issues.” *See id.* at 362 (quoted in Unit 1 Brf. at 76). This fact bolsters rather than detracts from ALPA’s position. Put simply, the Board found that the unremedied ULPs did not prevent impasse because, like the instant case, the parties had reached deadlock on issues separate and apart from the ULPs.

Unit 1 also fails in its attempt to distinguish *J.D. Lunsford Plumbing*, 254 NLRB 1360 (1981). In particular, it points to the fact that the Board in *J.D. Lunsford* found no causal connection between the ULP and impasse because the “Union’s bargaining stance indicated that it was not concerned with the old contract terms”—that is, the terms that had been unilaterally changed. *See id.* at 1366 (quoted in part in Unit 1 Brf. at 75). As with its attempt to distinguish *Washoe*, Unit 1 ignores the very similarities between the facts in *J.D. Lunsford* and the instant case. As we discussed in our opening brief, Unit 1 never demanded that ALPA recall the laid-off employees as a condition to, or even as a part of, bargaining. This fact shows, as the Board found in *J.D. Lunsford*, that Unit 1’s concern in the negotiations was not with ALPA’s January-February 2009 actions—the “old contract terms”—but with the terms of the successor agreement. The Board in *J.D. Lunsford* found that such facts did not establish a causal connection between an unremedied ULP and impasse. The same result is compelled here.

CONCLUSION

For the reasons stated, the ALJD erred in its findings against ALPA.

Respectfully submitted,

/s/ Devki Virk

Devki K. Virk

Kathleen Keller

BREDHOFF & KAISER, PLLC

805 Fifteenth Street, N.W., Suite 1000

Washington, DC 20005

(202) 842-2600 (Tel.)

(202) 842-1888 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of August, 2011 served a copy of this Brief in

Support of Exceptions by email service upon the following:

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

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

s/ Matthew Clash-Drexler
Matthew Clash-Drexler