

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

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

5-CA-34837

and

5-CA-35014

5-CA-35244

5-CA-35419

UNION OF ALPA PROFESSIONAL AND ADMINISTRATIVE
EMPLOYEES, UNIT 1

ANSWERING BRIEF OF THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

TABLE OF CONTENTS

I. Facts 1

II. Argument 1

1. The Evidence Establishes that ALPA Did Not Present the 2008 Layoffs of Unit 1 Employees as a Fait Accompli 1

2. The Evidence Establishes that ALPA Did Bargain with Unit 1 Over the Layoff and Effects of the Layoff of Elaine Grittner 6

3. The Record Evidence Establishes that ALPA Acted Properly In Asserting Confidentiality With Regard to the Identification of the Names and Positions of Employees Subject to Layoff 9

4. General Counsel Exhibits 56,57, 59, and 60 Are Not Relevant to the Unfair Labor Practice Charges and Were Properly Excluded..... 11

5. There Is No Record Evidence That Establishes that ALPA Bargained with Unit 1 Over the Layoffs of Individual Employees 13

6. The Merger of Delta and Northwest Airlines Eliminated the Work Performed by Elaine Grittner 14

7. ALPA Did Not Provide Merit Pay Increases to Any Employees After Expiration of the Collective Bargaining Agreement 15

8. ALPA’s Decision Not to Continue to Pay the Merit Pay Percentage Contained in the Final Year of the Expired Collective Bargaining Agreement Was Protected by the Board’s *Stone Container* Doctrine 18

 a. The Scheduled Due Date for Merit Pay Increases Following the Expiration of 2004-09 CBA Was a Discrete Event Under the *Stone Container* Doctrine 18

 b. There Is No Rationale For Limiting the *Stone Container* Doctrine to First Contract Settings 20

 c. ALPA Did Not Eliminate the Merit Pay Program..... 22

CONCLUSION..... 23

TABLE OF AUTHORITIES

CASES

<i>Ciba-Geigy Pharmaceuticals Division</i> , 264 NLRB 1013 (1982), enfd., 722 F.2d 1120 (3d Cir. 1982)	2
<i>Daily News of Los Angeles</i> , 304 NLRB 511 (1981), remanded, 979 F.2d 1571 (D.C. Cir. 1992).....	22
<i>Daily News of Los Angeles</i> , 315 NLRB 1236 (1994), enfd., 73 F.3d 406 (D.C. Cir. 1996)	16
<i>Detroit Edison Co. v. NLRB</i> , 440 U.S. 301 (1979)	10
<i>E.I. DuPont de NeMours & Co.</i> , 355 NLRB No. 177 (2010).....	19, 20
<i>Haddon Craftsmen, Inc.</i> , 300 NLRB 789 (1990).....	2, 4, 5, 7
<i>Jim Walter Resources</i> , 289 NLRB 1441 (1988).....	2
<i>Lange Co.</i> , 222 NLRB 558 (1976).....	4
<i>Northern Indiana Public Service Co.</i> , 347 NLRB 210 (2006)	11
<i>Owens-Corning Fiberglas</i> , 282 NLRB 609 (1987)	3, 4, 7
<i>Pontiac Osteopathic Hospital</i> , 336 NLRB 1021 (2001).....	9
<i>Saint-Gobain Abrasives</i> , 343 NLRB 542 (2004), enfd., 426 F.3d 455 (1st Cir. 2005).....	19
<i>Stone Container Corp.</i> , 313 NLRB 336 (1993).....	20, 21, 22
<i>TXU Electric Co.</i> , 343 NLRB 1404 (2004)	20, 21, 22

Pursuant to Section 102.46 of the Board’s Rules and Regulations, the Air Line Pilots Association, International (“ALPA”) files its answering brief to the cross exceptions filed by the General Counsel and Unit 1.

I. Facts

ALPA incorporates by reference the statement of the case and statement of facts from its brief in support of its exceptions at pp. 1-18, and its post-hearing brief at pp. 1-13.

II. Argument

1. The Evidence Establishes that ALPA Did Not Present the 2008 Layoffs of Unit 1 Employees as a *Fait Accompli*

In ALPA’s brief in support of its exceptions, ALPA argued that it did not have a duty to bargain over the layoffs of Unit 1 employees in 2009 because Unit 1 had waived its right to do so. Unit 1’s waiver is evidenced by Section 11 of the parties’ collective bargaining agreement, as interpreted by the parties’ past practice and bargaining history. A key piece of this showing was that Unit 1 had not made a demand to bargain with ALPA over any prior efforts by ALPA to engage in mid-contract layoffs. *See* ALPA Brf. in Support of Exceptions at 20-25.¹

While the ALJ found that Unit 1 had not waived its right to bargain—a finding that ALPA has argued was an error of law, *see* ALPA Brf. in Support of Exceptions at 18-36—the General Counsel and Unit 1 now argue that the ALJ erred by failing to find as well that ALPA presented the layoffs in 2008 of Unit 1 employees as a *fait accompli*, thus excusing the failure of Unit 1 to

¹ Unit 1 argues in its cross exceptions that the ALJ failed to consider “whether an employer’s non-routine decision to lay off employees for economic reasons could be the basis for a waiver of the right to bargain.” *See* Unit 1 Brf. in Support of Cross Exceptions at 9-11. This argument is irrelevant because ALPA’s argument is that Section 11 of the collective bargaining agreement is evidence of Unit 1’s waiver. The past practice of ALPA and Unit 1, along with the parties’ bargaining history, confirms this interpretation of the CBA. *See* ALPA Brf. in Support of Exceptions at 18-36.

demand bargaining. As we now show, this argument is without merit and, indeed, is contradicted by the very cases the General Counsel relies upon in its exceptions.

As the Board held in *Haddon Craftsmen, Inc.*, 300 NLRB 789 (1990), “[i]t is settled Board law that ‘when an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining.’” *See id.* at 790 (quoting *Jim Walter Resources*, 289 NLRB 1441 (1988)). Stated differently, *if* the “union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter.” *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), *enf’d*, 722 F.2d 1120 (3d Cir. 1982). The Board has recognized, however, that waiver of a right to bargain cannot be inferred where “the notice [of the intended change] is nothing more than informing the union of a *fait accompli*”—that is, where the notice is given “too short a time before implementation or because the employer has no intention of changing its mind.” *See id.*

No reading of the facts surrounding the 2008 layoffs could lead to the conclusion that the 2008 layoffs meet the *fait accompli* exception.

a. The General Counsel’s and Unit 1’s argument fails at the threshold because the record evidence establishes that ALPA informed Unit 1 as early as February of 2008—that is, *three months before the layoffs*—that, if ALPA lost a decertification vote at US Airways, which was scheduled for April of 2008, job eliminations would follow.

As Kelly Collie, testified without contradiction, the US Airways decertification petition was “huge” for ALPA, representing a “call for all hands on deck.” ALPA and Unit 1 discussed “the fact that if [ALPA] lost U.S. Airways, it would be a tremendous loss in terms of the number of members, in terms of the dues dollars that came in and in terms of [ALPA's] ability to keep

[its] existing staff employed.” Tr. 536:8-25; *see id.* at 557:8-17 (testimony by Ms. Collie that the ALPA and Unit 1 discussed “that if the U.S. Airways election didn't go the right way, then job elimination was virtually certain”). Eric Iverson, a member of Unit 1’s 2008 Negotiating Committee, confirmed Ms. Collie’s description, testifying that Unit 1 recognized the possibility of job loss if ALPA lost the US Airways representation position, Tr. 244:11-245:6; 245:12-24; *see also* R. Exh. 25 at ALPA 6500; Tr. 558:6-18 (testimony by John Schleder, the Unit 1 spokesman, acknowledging on February 25, 2008 that “ALPA [was] likely to make [changes]” over the term of the Agreement, including “consolidation of offices” and Unit 1 “expect[ed that ALPA would] need to close them”); R. Exh. 25 at ALPA 6508 (discussions between ALPA and Unit 1 of the likelihood of job abolishment during the term of the Agreement, specifically discussing the employees in Pittsburgh and Phoenix (employees who serviced US Airways) and that ALPA would be “evaluating their skills/experience [with] ALPA’s needs” in order to make decisions about job abolishment). Put simply, the undisputed record establishes that ALPA gave Unit 1 *three months* notice that layoffs of Unit 1 staff would result if ALPA lost the decertification petition at US Airways. The Board has made clear that such notice is more than sufficient. Indeed, in *Owens-Corning Fiberglas*, 282 NLRB 609 (1987), the primary case relied upon by the General Counsel, the Board held that six *days*’ notice “would ordinarily be considered sufficient time for bargaining to take place.” *See id.* at 613. Accordingly, the General Counsel’s assertion that ALPA failed to provide Unit 1 with timely notice of the job eliminations that would result from the US Airways decertification vote must be rejected.

b. Nor has the General Counsel or Unit 1 presented evidence that, when ALPA informed Unit 1 regarding the layoffs, ALPA had no intention of changing its mind. In this regard, the General Counsel points to the fact that Jalmer Johnson and Kelly Collie “generated a

list of proposed staff cuts for ALPA's national officers' review," and that the national officers approved the list on May 8, 2008. *See* GC Brf. in Support of Exceptions at 4.

The crux of this argument is that ALPA presented the 2008 layoffs as a *fait accompli* because ALPA had already developed the plans regarding the layoffs before the notification was made to Unit 1. One of the very case upon which the General Counsel chiefly relies, however, makes clear that such facts fall far short of what is necessary to find that a proposed change was presented as a *fait accompli*. This is because the Board has made clear that "it is not unlawful for an employer to present a proposed change in terms and conditions of employment as a fully developed plan or to use positive language to describe it." *Haddon Craftsmen, Inc.*, 300 NLRB at 790 (citing *Owens-Corning Fiberglas Corp.*, 282 NLRB at 609 n.1 (cited by the General Counsel)).

Haddon Craftsmen is illustrative of this principle. In that case, the employer notified the union that it had decided to reclassify certain employees into lower job classifications. *See Haddon Craftsmen, Inc.*, 300 NLRB at 789. As in the instant case, the union made no demand to bargain. *See id.* Instead, the union in *Haddon* argued, as the General Counsel and Unit 1 does here, that the union had no duty to demand bargaining because the action was presented by the employer as a *fait accompli*. Specifically, the union pointed to the fact that the employer had "decided on the change" before informing the union and that the employer testified during the hearing that it believed it could implement the changes without consultation with the union. *See id.* at 790 n.8. The Board squarely rejected the argument that these facts constitute a *fait accompli*, noting that, after reaching a decision concerning a mandatory subject, the law requires an employer "to delay implementation of the decision until after it has consulted with the bargaining representative, but does not require that the employer delay the decision-making

process itself.” *See id.* (citing *Lange Co.*, 222 NLRB 558, 563 (1976)). Accordingly, the Board found that the employer did not present the reclassification to the union as a *fait accompli*.

The same result follows here. As in *Haddon*, it is immaterial that ALPA determined that if it were to lose the decertification vote at US Airways, layoffs would follow or that ALPA witnesses testified at the hearing that they did not believe ALPA had a duty to bargain over the layoffs. What is dispositive, as in *Haddon*, is that the facts are undisputed that ALPA notified Unit 1 of that determination months before the layoffs occurred. *See supra* at 2-3. At that point, Unit 1 had the “obligation to request bargaining over the change or risk a finding that it has lost its right to bargain through inaction.” *Haddon Craftsmen, Inc.*, 300 NLRB at 790-91. For those reasons, the General Counsel and Unit 1 have not established the 2008 layoffs were presented as a *fait accompli*.²

² While the foregoing is dispositive, it bears noting that the record confirms that Unit 1’s failure to demand bargaining was not because, as the General Counsel now argues, Unit 1 objectively or subjectively believed that bargaining over the layoffs was futile. To the contrary, Unit 1 had itself decided that it would not demand bargaining in such circumstances. As Wayne Klocke, co-chair of Unit 1’s bargaining committee, testified, Unit 1 made a demand to bargain with regard to the 2009 layoffs because there was a “change in philosophy” within Unit 1’s leadership. *See* GC Exh. 43 at 7; Tr. 626:3-5.

This fact also compels the rejection of Unit 1’s attempt to establish that layoffs that occurred during the term of the 2000-04 collective bargaining agreement were presented to Unit 1 as a *fait accompli*. *See* Unit 1 Brf. in Support of Cross Exceptions at 6. Put simply, Unit 1 has failed to sustain its burden. To the contrary, the record evidence shows that, as Mr. Klocke testified, Unit 1 had made the determination that it would not demand bargaining in such circumstances. It was only in 2009 when Unit 1 had a “change in philosophy.” Tr. 626:3-5. Thus, the record evidence contains no facts that the manner in which ALPA presented the layoffs during the term of 2000-04 CBA made Unit 1 believe that bargaining would be futile.

2. The Evidence Establishes that ALPA Did Bargain with Unit 1 Over the Layoff and Effects of the Layoff of Elaine Grittner

The General Counsel and Unit 1 also argue that the ALJ failed to find that Elaine Grittner's layoff was presented by ALPA to Unit 1 as a "fait accompli." GC Brf. in Support of Cross Exceptions at 5; Unit 1 Brf. in Support of Cross Exceptions at 11.

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

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

GC Exh. 44.

Unit 1 subsequently made a demand to bargain with ALPA over the decision to layoff Ms. Grittner and the effects of that decision. While the General Counsel concedes—as it must—that in response to that demand, ALPA and Unit 1 subsequently met for nearly two days, more than a month before the effective date of the layoff to "discuss the RIF" and for ALPA to "consider any proposals [by Unit 1] . . . to avoid the RIF," the General Counsel and Unit 1 nevertheless argue that the ALJ should have found that ALPA presented the layoff of Ms. Grittner as a "fait accompli." They rely on two primary facts: (i) that ALPA informed Unit 1 that it did not believe

it had an obligation to bargain over the layoff of Ms. Grittner, and (ii) that ALPA had already determined a date to abolish Grittner's position, when it met with Unit 1. Neither of these facts properly considered provide any support for this cross exception.

a. As we showed above, the Board has made clear that these facts fall short of what is necessary to establish that a proposed change was presented as a *fait accompli*. See *supra* at 1-4. As with the cross exceptions with regard to the 2008 layoffs, the General Counsel and Unit 1 again focus on the fact that ALPA presented the layoffs to Unit 1 with a date certain for Ms. Grittner's layoff. In other words, the General Counsel and Unit 1 rely on the same two facts that the Board found were not sufficient to establish that a change was presented as a *fait accompli*. See *Haddon Craftsmen, Inc.*, 300 NLRB at 790 n.8. The Board, however, has made clear that "it is not unlawful for an employer to present a proposed change in terms and conditions of employment as a fully developed plan or to use positive language to describe it." *Haddon Craftsmen, Inc.*, 300 NLRB at 790 (citing *Owens-Corning Fiberglas Corp.*, 282 NLRB at 609 n. 1 (cited by the General Counsel)); see *id.* at 790 n.8 (holding that the law requires an employer "to delay implementation of the decision until after it has consulted with the bargaining representative, but does not require that the employer delay the decision-making process itself"). This rule applies so long as the employer's notice is not presented "too short a time before implementation." Here, however, ALPA gave Unit 1 nearly three months' notice, and it did not implement its decision until *after*, as set forth below, ALPA met with Unit 1. See *supra* at 6. Accordingly, the argument that ALPA presented Ms. Grittner's lay off as a *fait accompli* must be rejected.

b. Moreover, the General Counsel's and Unit 1's argument ignores that ALPA and Unit 1 did in fact bargain over Grittner's layoff. Specifically, in response to Unit 1's demand to

bargain over the decision to abolish Grittner's position, and its effects, ALPA and Unit 1 set aside two days, on December 14 and 15, 2009, to discuss Grittner's situation and consider any mitigating proposals Unit 1 might have.³ See Tr. 627:12-14 (noting that the parties agreed to meet "[t]o discuss options or alternatives to conducting a job elimination" for Grittner). ALPA and Unit 1 discussed a vacancy in Houston for a benefits specialist, but as Grittner was not willing to relocate from Minneapolis, it "significantly limited" ALPA's options. Tr. 627:20-628:4. Unit 1's own notes indicate that Collie told them that Grittner "could have Houston." GC Exh. 43, 12/14/09 at 8. This fact is fatal to the argument by the Acting General Counsel and Unit 1. Contrary to Unit 1's assertion that ALPA had "made a final and irrevocable decision, before announcing her layoff to Unit 1, that Grittner would be terminated at the end of January," see Unit 1 Cross Exceptions at 12, the facts show that ALPA made a proposal to allow Ms. Grittner to avoid the Reduction in Force by accepting a position in ALPA's Houston office.

Unit 1 rejected that proposal. Instead, Mr. Iverson testified that Unit 1 "tried to propose a model position for her based upon that she could telecommute." Tr. 220:5-6. Stated differently, Unit 1's proposal was to essentially invent a job for Grittner out of whole cloth. Collie pointed out that there were not funds budgeted for a new position (as Grittner's position had been paid for by the MEC, which did not want to spend its funds to cover a benefit specialist for plans that no longer existed). At the conclusion of the second day of discussions regarding Grittner, ALPA and Unit 1 were unable to reach any agreement, and Russ Woody, speaking for Unit 1, stated that ALPA "can check the bargaining box [re EG] as unsuccessful." Tr. 630:19-631:2; R. Exh. 35 at

³ When asked by Unit 1 if ALPA was bargaining, Jim Johnson, speaking for ALPA, said that was a "question for another agency" (*i.e.*, the NLRB) to determine. GC Exh. 43, 12/15/09 at 6.

10.⁴ Following that meeting, on December 16, ALPA sent Grittner a letter informing her that her position would be abolished effective January 29, 2010. R. Exh. 17 at 46.

In sum, the cross exception of the General Counsel and Unit 1 elevates labels over facts, focusing on ALPA's reservation of its position regarding the duty/obligation to bargain over the actual steps ALPA took in response to Unit 1's demands to bargain. When those facts are considered, no credible argument can be made that ALPA did not in fact bargain with Unit 1. As set forth above, ALPA gave Unit 1 nearly three months notice of its intent to layoff Grittner. ALPA set aside two days to meet with Unit 1 to discuss this single employee. The parties exchanged proposals and caucused amongst themselves. ALPA listened to and considered Unit 1's proposals with respect to Grittner. The parties were unable, though, to reach agreement. Those facts provide no basis to conclude that ALPA failed to "afford [Unit 1 with] a reasonable opportunity for counter-arguments or proposals." *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). Accordingly, the cross exception by the Acting General Counsel and Unit 1 must be rejected.

3. The Record Evidence Establishes that ALPA Acted Properly In Asserting Confidentiality With Regard to the Identification of the Names and Positions of Employees Subject to Layoff

Prior to conducting the 2009 layoffs, ALPA met with Unit 1 and provided Unit 1 with the number of positions that were being eliminated and the aggregate salary figures for those positions, but did not provide the individual names or positions to Unit 1. Tr. 316:11-317:22.

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

589:4-13, 589:19-590:7; Exh. R.32. When Unit 1 subsequently requested that ALPA identify the position to be eliminated, ALPA offered to provide Unit 1 with the requested information on the condition that Unit 1 agree to keep the information confidential. The record is undisputed that Unit 1 refused. The General Counsel now argues that ALPA that the ALJ erred by failing to find that ALPA failed to meet its burden to establish that the names or positions of employees subject to layoff are confidential. *See* GC Cross Exception Brf. at 7.

In this regard, it is well established that when an employer objects to providing information which it asserts is confidential, it must explain why the information is confidential, and come forward with some offer to accommodate its concerns. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). A review of the record evidence confirms that ALPA has met this standard.

As an initial matter, the General Counsel misstates the reason why ALPA asserted confidentiality over the names and positions that were to be eliminated. While James Johnson did testify that ALPA wanted to conduct the layoffs “humanely,” *see* Tr. 427:25, the General Counsel ignores the fact that, at the heart of this concern, was that, as Mr. Johnson further explained, the list of names could change prior to any formal announcement of the RIF, and ALPA wanted to avoid *potential* names spreading through the organization's grapevine. Tr. 427:12-428:7; *Cf.* Tr. 672:19-22 (Collie explaining that she could not identify positions “because the composition of the list may change for a variety of reasons”). This concern was particularly acute because the methodology for identifying employees for layoffs was not through a formulaic process but rather through an exercise of management discretion whereby the leadership determined “what the priorities in the membership are and what our financial constraints are, and what the services are that we are continuing and/or discontinuing, and how

we fit that all together.” Tr. 642:22-643:7. Stated differently, ALPA was attempting to determine the value of each position to the organization. Given these criteria, it would be highly detrimental to morale and work effectiveness for employees to learn that they were considered but not selected for layoff. It was for that reason that ALPA agreed to provide the information to Unit 1 only with a confidentiality agreement.

It was Unit 1 that thereafter flatly refused this offer, and did not even engage in a bargaining process over acceptable terms of confidentiality. Tr. 428:7-18.⁵

In sum, ALPA’s request for some type of confidentiality was a reasonable accommodation to sharing this sensitive information, which would necessarily have an impact on employee morale and effectiveness.⁶ Because Unit 1 failed to consider this request, or engage in bargaining over it, ALPA was privileged to deny Unit 1 the information. *See Northern Indiana Public Service Co.*, 347 NLRB 210 (2006).

4. General Counsel Exhibits 56,57, 59, and 60 Are Not Relevant to the Unfair Labor Practice Charges and Were Properly Excluded

During the hearing, the General Counsel attempted to introduce two informational picket signs, *see* GC Exhs. 56-57, and two communications from ALPA management regarding the possibility of a strike, *see* GC Exhs. 59-60. The ALJ rejected those exhibits, stating that, with regard to exhibits 56 and 57, he does not “see these as germane to the case before me[, as p]icketing is not part of the General Counsel's case.” *See* Tr. at 295:22-23. He further stated,

⁵ This marked another change from Unit 1's prior stance. In 2008, President Jay Wells had offered to keep the names confidential if ALPA was willing to share them, but ALPA was not willing to do so at that time. Tr. 673:10-12; GC Exh. 69.

⁶ This is particularly so where the composition of the contemplated list might change, which, in this case, it did, as ALPA's initial forecast was for seven or eight positions to be eliminated in Minneapolis, GC, Exh. 5 2/9/2009, at 1, but only five employees were ultimately laid off, R. Exh. 17.

with regard to exhibits 59 and 60, that those exhibits do not “address the allegations in the General Counsel's complaint, since as we all know a strike did not take place.” Tr. at 300:21-23.

In excepting to the ALJ's rejection of these exhibits, the General Counsel argues that they are relevant to respond to ALPA's claim “that an essential element of the standstill agreements [entered into by ALPA and Unit 1 to extend the term of the 2009 CBA for one additional day] was the suspension of merit-pay increases.” See GC Brf. in Support of Cross Exceptions at 9. Proving fatal to the General Counsel's exception is that ALPA has made no such argument. To be sure, ALPA witnesses Kelly Collie and James Johnson both testified that they specifically mentioned to Unit 1 that there would be no pay increases during the stand still period, and Collie recalled specifically referencing merit increases. Tr. 435:13-436:14; 514:25-516:20. Unit 1's witnesses did not recall any discussion of merit increases at this time. ALPA however made clear that that factual dispute is “immaterial” to the legal question of whether ALPA was obliged to provide merit-based pay increases to Unit 1 employees after March 31, 2009. See ALPA Post-Hearing Brf. at 54 n.33. Rather than focusing on whether the *standstill agreement* effected a suspension of merit pay, ALPA's argument, as set forth in detail in ALPA's exceptions brief, was that the bargaining history of the parties in the agreements from *1992 through 2008* established that the merit-pay increases were a component of compensation as to a *particular contract year* and therefore the rate in the final year of the contract was not intended to and did not survive expiration. See ALPA Brf. in Support of Exceptions at 58-68.

For those reasons, the General Counsel's attempt to introduce documentary evidence to establish “the environment in which these standstill agreements were negotiated,” see GC Brf. in Support of Cross Exceptions at 9, was properly rejected by the ALJ.

5. There Is No Record Evidence That Establishes that ALPA Bargained with Unit 1 Over the Layoffs of Individual Employees

The next cross exception asserted by the General Counsel and Unit 1 is that the ALJ erred by failing to find that “ALPA bargained over the layoffs of individual employees.” GC Brf. in Support of Cross Exceptions at 7; Unit 1 Brf. in Support of Cross Exceptions at 5. This argument is without any merit.

By way of background, ALPA and Unit 1 had occasionally entered into settlement agreements in which ALPA agreed to officially characterize a severance as a “job abolishment” as part of the settlement. *E.g.*, Tr. at 651:24-652:10. As ALPA's Human Resources Director, Kelly Collie, explained in her testimony, these settlements sometimes arose when there were performance issues with an employee; as part of the employee's negotiated departure, ALPA would agree to term the separation a job abolishment rather than a termination “[s]o that the employee would leave ALPA with a better chance of becoming re-employed” and would provide some severance pay in exchange for a general release of claims by the departing employee. Tr. 702:12-704:5; Tr. 709:8-15. All such settlements had confidentiality clauses. Tr. 702:15-18. These settlements have no relevance at all to the issue in this case – whether ALPA had an obligation to bargain over mid-contract layoff, and whether Unit 1 waived any statutory right to bargain through past practice and the course of bargaining with ALPA. ALPA has not relied on any of those negotiated departures in presenting evidence regarding the parties past practice.

The ALJ summarized his position regarding this evidence as follows:

So the parties sat down and they worked out some type of an agreement. And in certain circumstances, instead of a termination of an employee, the parties agreed that someone's final . . . personnel document would show that an individual job was abolished rather than the individual was terminated. . . .

It had nothing to do, as I understand it, with a job abolishment under Section 11 of the contract.

Tr. at 704:10-20 (emphasis added); *see also id.* at 714:10-13 (“But I see it as night and day between someone whose job is being abolished due to a lack of work available for that position versus a potential performance issue.”).

Put simply, those agreements were not layoffs pursuant to Section 11—the contractual provision that addresses layoffs of Unit 1 members that are at issue in these unfair labor practice charges. Accordingly, those agreements have no relevance to whether Unit 1 had waived its right to bargain over the layoffs.

6. The Merger of Delta and Northwest Airlines Eliminated the Work Performed by Elaine Grittner

While the ALJ found that ALPA violated the Act by failing to bargain over the layoff of Elaine Grittner,⁷ the ALJ also found that, “[s]ince Grittner’s position of benefit specialist specifically supported Northwest Airline pilots and those duties were being transferred to Atlanta for servicing by the current Delta Airlines benefits specialist, it was necessary to abolish [Grittner’s] position.” ALJD 7:15-16. The General Counsel excepts to this finding. The sum total of its argument is that there is “no evidence that it was *necessary* to abolish Grittner’s position.” *See* GC Brf. in Support of Cross Exceptions at 11 (emphasis in original).

This argument ignores substantial evidence in the record that supports the ALJ’s finding. In particular, the record evidence establishes that Ms. Grittner was a “benefits specialist” for ALPA. *See* Tr. 254:13-17. In that role, her “primary responsibility was to interact with [Northwest] pilots and help them with their benefits related questions with respect to the plans actually, all of the benefit plans that covered Northwest pilots and their families.” Tr. 628:9-12; *see id.* at 254:15-17 (testimony by Unit 1 witness Eric Iverson that Ms. Grittner provided advice

⁷ ALPA filed exceptions to the ALJ’s decision regarding the layoff of Elaine Grittner. *See* ALPA Brf. in Support of Exceptions at 36-38.

to the Northwest Master Executive Council regarding the benefits that were available to ALPA members as a result of their employment with Northwest Air Line). The record is also undisputed that because of the merger of Delta and Northwest Air Lines, “all former [Northwest] pilots will be participants in [Delta’s] health and benefit plans.” *See* GC Exh. 44. In short, Northwest pilots would no longer be receiving a separate plan of benefits. Accordingly, the very benefit plans that Ms. Grittner was generally responsible for administering and interacting with the pilots regarding would no longer be provided. *See* Tr. at 628:13-19.

Thus, contrary to the General Counsel’s conclusory argument, there exists *substantial* record evidence that Ms. Grittner’s position as benefits specialist for Northwest Air Line pilots ceased to exist after the Delta-Northwest merger.

7. ALPA Did Not Provide Merit Pay Increases to Any Employees After Expiration of the Collective Bargaining Agreement

The General Counsel and Unit 1 also challenge the ALJ’s finding that “no employee whose anniversary date occurred after the expiration of the agreement was permitted to receive their merit pay entitlement.” *See* GC Brf. in Support of Cross Exceptions at 11-13; Unit 1 Brf. in Support of Cross Exceptions at 13. While the cross exception focuses on a very narrow set of facts—namely, that, as a result of a clerical error, ALPA paid and subsequently recouped merit pay from four employees after expiration of the CBA—the General Counsel proceeds to reassert the argument that ALPA violated the Act by failing to pay merit pay increases after expiration of the CBA. Accordingly, we address both arguments in turn.

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.

Proving fatal to the ALJ's Decision 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. in Support of Exceptions at 61-66.

The General Counsel responds to this showing by arguing that the "merit pay percentages in Section 16 of the contract have beginning dates, but there are no end dates," GC Cross Exceptions at 12, 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.*"⁸ 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

⁸ 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.").

“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 to the contract 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—and the parties’ mutual understanding of 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.

In its cross exception, the General Counsel makes much of ALPA’s acknowledged clerical error in paying four employees merit raises after March 31. *See* GC Brf. in Support of Cross Exceptions at 13. Indeed, the General Counsel even contends that these four erroneous merit payments somehow undercut ALPA’s argument that, after the expiration of the 2004-09 agreement, ALPA did not know what rate to apply. *See* GC Brf. in Support of Cross Exceptions at 13 (“Despite claiming to not know what merit rate to enter into the payroll system after March 31, Collie admitted that ALPA paid four employees merit raises after March 31”). 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. There is therefore no basis to find that a clerical error that was corrected constitutes evidence that ALPA understood that the merit pay percentages set forth in the expired contract continued past expiration.

In sum, and as we explained in detail in our brief in support of ALPA's exceptions, the record evidence leads to only one conclusion: that the CBA, as confirmed by the parties' mutual understandings set forth in bargaining notes and past practice, sets forth a specific merit-based pay percentage increase that is applicable only to a defined contract year and which therefore does not survive contract expiration.

8. ALPA's Decision Not to Continue to Pay the Merit Pay Percentage Contained in the Final Year of the Expired Collective Bargaining Agreement Was Protected by the Board's *Stone Container* Doctrine

The General Counsel's final cross exception is that the ALJ erred by failing to find three additional reasons why the Board's *Stone Container* doctrine is not applicable to the instant case. Specifically, the General Counsel argues that the *Stone Container* doctrine is applicable (i) only in first contract settings, (ii) where the term unilaterally changed is due to a "discrete event" under *Stone Container*, and (iii) where the term unilaterally changed is temporary rather than permanent. As we now show, none of these arguments has any merit.⁹

a. The Scheduled Due Date for Merit Pay Increases Following the Expiration of 2004-09 CBA Was a Discrete Event Under the *Stone Container* Doctrine

The General Counsel's first argument is that the merit pay program does not constitute a discrete event under *Stone Container* because the evaluations of ALPA's employees—the trigger for the merit pay increase—"occur on a rolling basis throughout the year." GC Brf. in Support of Cross Exceptions at 14. In other words, the General Counsel's position is that *Stone Container* is inapplicable because the merit increases for each employee happen on separate dates throughout

⁹ In our brief in support of ALPA's exceptions at 68-69, we showed that the ALJ erred by failing to find that *Stone Container* was applicable here. In particular, we showed that ALPA provided Unit 1 with reasonable advance notice and an opportunity to bargain. In fact, the parties had been bargaining over the compensation package since at least February 12, 2009. ALPA had, from February 12, 2009 onward, consistently maintained its position that it needed to achieve a wage freeze going forward, including zero percent increases for all performance appraisal levels. See ALPA Brf. in Support of Exceptions at 69.

the year. According to the General Counsel, the “discrete event” requirement must apply to all employees on the same date—that is, it must be a “single” discrete event. *See id.* The General Counsel has cited to no cases that support this argument.

The “discrete, recurring event” requirement was set forth in detail in the decision of the Administrative Law Judge, which was affirmed by the Board, in *E.I. DuPont de Nemours & Co.*, 355 NLRB No. 177 (2010). At issue in that case was an employer’s imposition, during the course of bargaining for a successor collective bargaining agreement, of a wide range of changes to the benefits available to bargaining unit members. In particular, the employer imposed changes to:

the amount that employees paid for prescription drugs was increased; cost penalties were implemented for employees who filled “maintenance medication” prescriptions at retail pharmacies rather than through a mail order service designated by the Respondent; the “Employee + One” coverage level for medical, dental, and vision benefits was eliminated and replaced with “Employee + Child(ren)” and “Employee + Spouse” coverage levels; employee premiums were increased for some medical options and coverage levels; employee premiums were increased for the “high” dental coverage option; coverage levels for medical, dental, and vision options, were altered; employee premiums were increased for the financial planning program; and a health savings account plan was created.

See id. at 4-5. The ALJ rejected the Employer’s assertion that its conduct was permitted under the *Stone Container* doctrine, finding that the “changes were not a discrete, recurring event.” *See id.* at p. 11. Contrasting the discrete events in cases like *Stone Container*, which involved a “yearly wage increase/review” or *Saint-Gobain Abrasives*, 343 NLRB 542 (2004), *enf’d* 426 F.3d 455 (1st Cir. 2005), which involved the annual review and adjustment of a health insurance program, the Board in *DuPont* noted that the changes “were not confined to recurring adjustments to a single plan.” *See Dupont*, 355 NLRB No. 177 at 12. Instead, the employer’s conduct in *DuPont* “included a number of ad hoc actions that were not annually occurring events,” including “the addition [of] wholly new benefit plans.” *Id.*

The facts of the instant case have no resemblance to those in the *DuPont* case. As explained above, *DuPont* involved a “mixed bag of changes” imposed by the employer that were not related to annually recurring events. By contrast, the review dates for ALPA employees—and any merit pay increase to salary that would be associated with those reviews—occurs annually on each employee’s anniversary. It is therefore a discrete, recurring event. *Compare TXU Electric Co.*, 343 NLRB 1404 (2004) (annual review and possible wage adjustment); *Stone Container Corp.*, 313 NLRB 336 (1993) (describing wages increases as annually occurring events).¹⁰ For that reason, the General Counsel’s assertion that the annual review dates for employees did not constitute a discrete and recurring event is without merit.

b. There Is No Rationale For Limiting the *Stone Container* Doctrine to First Contract Settings

Equally flawed is the General Counsel’s argument that the *Stone Container* doctrine can only be applied in first contract settings.

As an initial matter, the General Counsel is flatly wrong when it asserts that no case has applied *Stone Container* outside first contracts. The *DuPont* case discussed *supra* belies that argument. As set forth above, *DuPont* involved an attempt by an employer to impose a wide range of changes to the benefits available to bargaining unit members while the employer and the union were in the midst of negotiations. Significantly, the employer and the union had been in a bargaining relationship “for many decades” and had negotiated a series of collective bargaining

¹⁰ The General Counsel’s argument that the merit pay increases are not a discrete event because the merit pay increases arise on separate dates for each employee fares no better. Whether the merit pay increase occurred on a single day or 160 separate days is not determinative. Instead, the question is whether the issue is one in which the “employer had no choice but to take some action.” *See DuPont*, 355 NLRB at 12. That is precisely what occurred here when each anniversary date arose during the course of bargaining. *See ALPA Brf. in Support of Exceptions at 66-67* (discussing that well-established law prohibited ALPA from paying any merit pay increase following contract expiration absent the *Stone Container* doctrine or absent agreement on the entire CBA).

agreements. Proving fatal to the General Counsel’s argument is that, while the ALJ, as affirmed by the Board, found that the employer’s conduct was not protected by *Stone Container*, neither the ALJ nor the Board based the decision on—or even mentioned—the fact that the parties were not negotiating a first contract. Instead, the ALJ engaged in a lengthy discussion of whether the changes in question were in response to a “discrete and recurring event.” This discussion and detailed analysis would have been unnecessary if, as the General Counsel asserts, the doctrine cannot be applied outside the first contract.

While the foregoing is dispositive, it bears noting that there is no justification for limiting *Stone Container* to first contract settings. The rationale underlying the *Stone Container* doctrine is that there is a regularly scheduled event on which the employer must take action and which cannot wait for the conclusion of the parties’ negotiations. *Stone Container Corp.*, 313 NLRB 336 (“[B]argaining over the amount of such increases could not await an impasse in overall negotiations.”). As the instant case makes clear, those regularly scheduled events occur both while parties are negotiating a first contract as well as following expiration of a collective bargaining agreement. In both situations, the need to address the recurring event arises “*even if the parties have not reached overall agreement or impasse in bargaining by that date.*” *TXU Electric Co.*, 343 NLRB at 1405 (emphasis in original). Accordingly, the relevant question is not whether, as the General Counsel contends, the recurring event arises from a “mature bargaining relationship,” *see* GC Brf. in Support of Exceptions at 15; instead, it is whether, as here, a recurring event requiring the employer’s action has arisen during the course of bargaining. In such a situation, the teachings of *Stone Container* must apply.

c. ALPA Did Not Eliminate the Merit Pay Program

The General Counsel’s final argument—that *Stone Container* does not apply because “ALPA permanently eliminated merit pay payments,” *see* GC Brf. in Support of Exceptions at 15—is simply wrong on the law and the facts.

Stone Container itself again provides an apt illustration of this principle. In that case, the employer notified the union, as did ALPA here, that for economic reasons it could not grant employees their annual wage increase, which was to occur while the parties were in negotiations. Of particular significance to the Board was that the employer “was not proposing to permanently abandon the . . . wage increase;” nor was it “declining to bargain over how much an increase, if any, it should give.” *See Stone Container*, 313 NLRB at 336. Rather, it “simply made a decision here regarding the particular wage increase and did not purport to terminate the annual wage review practice.” *See id.* at 336 n.7; *see also TXU Electric Co.*, 343 NLRB at 1407 (finding that under *Stone Container* it is permissible for an employer to propose to “continue [a] practice for that year, to modify it, or to delete it for that year”); *Daily News of Los Angeles*, 304 NLRB 511 (1981) *remanded*, 979 F.2d 1571 (D.C. Cir. 1992) (finding that, following certification, the employer decided to “terminate” its practice of granting merit increases).

That is precisely what ALPA did here. In no way had ALPA announced that it would give no merit increases to those employees with anniversary dates after April 1, 2009. Nor did ALPA announce that it was somehow discontinuing the program. In fact, ALPA was at all times actively seeking to negotiate a consensual agreement respecting merit pay for these employees, as well as all other terms and conditions for the Unit 1-represented employees. Accordingly, the General Counsel’s assertion that ALPA “permanently eliminated merit pay payments” must be rejected.

In sum, even if it were determined that ALPA did make a change to existing terms and conditions of employment, its conduct was permitted under the Board's *Stone Container* doctrine.

CONCLUSION

For the reasons set forth above, the cross exceptions of the General Counsel and Unit 1 must be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of August, 2011 served a copy of this

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